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IN THE

Supreme Court of the United States

October Term, 1975

No. 75-229

ARMEN DE FILIPPO and SHELDON FLEISHMAN
t/a A & S, *a Partnership*,
Petitioners,

v.

FORD MOTOR COMPANY,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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The Plaintiffs-Petitioners, Armen De Filippo and Sheldon Fleishman, respectfully pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit reversing the District Court's entry of judgment for Plaintiffs. The judgment of the Court of Appeals was entered in this proceeding on May, 8, 1975, and rehearing in banc was denied on June 10, 1975.

OPINIONS BELOW

The opinion of the Court of Appeals (Appendix A herein) is reported at 1975 Trade Cases ¶60,319. The Court's Order denying rehearing in banc (Appendix B herein) is not yet officially reported. The opinion of the District Court for the Eastern District of Pennsylvania (Appendix C herein) is reported at 378 F.Supp. 456.

JURISDICTION

The judgment of the Court of Appeals was entered on May 8, 1975, and a petition for rehearing in banc was denied on June 10, 1975. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Is the holding of the Court of Appeals, that an exclusionary or anti-competitive purpose is a requisite of a group boycott under Section 1 of the Sherman Act, in direct contravention of the decisions of this Court and in conflict with a holding of the Ninth Circuit Court of Appeals?

2. Did the Court of Appeals, in ignoring a finding of the jury of an anti-competitive purpose, violate Plaintiffs' Seventh Amendment right to a trial by jury and the prior decisions of this Court?

3. Did the Court of Appeals, in holding that the Sherman Act protection against group boycotts applies only to group action which deprives a competitor of terms which were made available to the members of the group, carve out an exception to the group boycott doctrine which is in conflict with the decisions of this Court and of the Fifth Circuit Court of Appeals?

4. Does the decision of the Court of Appeals emasculate the group boycott prohibition and violate the public policy underlying the Sherman Act?

CONSTITUTIONAL PROVISION INVOLVED

Seventh Amendment to the United States Constitution.

STATUTE INVOLVED

Section 1 of the Sherman Act, 15 U.S.C. 1.

STATEMENT OF THE CASE

I. *Factual Background*

The antitrust claim in Plaintiffs' Complaint charged that Ford and its Philadelphia area dealers had conspired to prevent Plaintiffs from becoming dealers at a Ford dealership located in Philadelphia, known as Presidential Motors (21a-22a), and that in so doing Ford and its dealers had engaged in a concerted refusal to deal, or "group boycott", a *per se* violation of Section 1 of the Sherman Act, 15 U.S.C. §1 (33a-37a, 42a-43a). The evidence adduced at the trial in support of this claim was the following.

Plaintiffs became Ford dealers at Chestnut Motors, Inc. ("Chestnut") in Philadelphia early in 1969 under a "dealer development" arrangement in which Plaintiffs put up 20% ($60,200) and Ford put up 80% of the investment required to purchase the dealership from the previous dealer. As is typical under a "dealer development" arrangement, Plaintiffs were to buy out Ford's investment with the dealership's profits, if any.

Plaintiffs operated Chestnut for 8½ months until a fire destroyed a portion of the facilities. Whereas Chestnut had been losing substantial sums under its prior management, it made a net profit of slightly over $100,000 during the 8½ months under Plaintiffs' operation (P-100 151ex). Shortly after the fire, persons in the Ford Philadelphia District Office suggested to Plaintiffs that instead of rebuilding Chestnut and resuming normal operations there, Plaintiffs take over the operation of Presidential Ford ("Presidential"), a company-owned dealership which, under various managers, had lost large sums of

money. Plaintiffs' reaction was that they would prefer to rebuild Chestnut, where they knew they could operate profitably, rather than take over Presidential, which they knew had been unprofitable in the past. The Ford personnel assured Plaintiffs that Ford would make the terms of the deal for Presidential sufficiently attractive that Plaintiffs could do at least as well as Presidential as they had at Chestnut, and, based upon these assurances, Plaintiffs agreed to permit Chestnut to be dissolved and to take over the operation of Presidential (53a-61a).

Extensive negotiations followed, during which Ford offered Plaintiffs certain terms intended to make the Presidential proposal financially viable. These terms included a deferred rent plan and a deferred investment period (whereby Plaintiffs were to have a 3-month "turnaround" period as managers of Presidential before their money was to be invested). A Ford representative drafted a "Buy-Sell" Agreement (P-115 160ex) containing the terms agreed upon, which was shown to Plaintiffs and approved by them (80a-85a). A meeting was then held December 18, 1969, which Plaintiffs were told was for the purpose of formally executing the Buy-Sell Agreement they had previously been shown and approved. At the December 18 meeting, Plaintiffs were told that the deferred rent provision of the Agreement was subject to approval by Ford Leasing Co., a separate division of Ford. Plaintiffs objected, but then agreed to that condition. Plaintiffs signed the Agreement, subject to the condition, and the documents were held in escrow pending approval by Ford Leasing (85a-92a). On December 29, 1969 Ford Leasing sent a telegram (P-73 115ex) approving the deferred rent, and Plaintiffs were advised that the date they would commence operations at Presidential was January 5, 1970 (99a-101a).

Unknown to Plaintiffs, certain other Ford dealers in close proximity to Presidential, and particularly Pacifico, Matthews and McGowen, had become aware that Plaintiffs were going to take over the Presidential operation and

complained about it to the Ford District personnel and to Ford's Dealer Policy Board in Detroit. The complaints took the form of threats to resign their dealerships if Ford completed the Presidential deal with Plaintiffs (186a, D-64, 276, 286ex). The ostensible basis of the complaints was that the terms of the agreement between Ford and Plaintiffs constituted "special concessions" to Plaintiffs. At trial, however, it was established that the objecting dealers recognized these terms were essential if Plaintiffs were to be successful at Presidential, and that their real motive was to eliminate Presidential as a competitor, or at least eliminate Plaintiffs on terms where they might be successful (182a-183a, 185a, 600a-601a, 409a, 418a-419a, 595a). Rather than tell Plaintiffs of the threats and their possible effect on Plaintiffs' takeover of Presidential, Ford told Plaintiffs that there was a "temporary hold" caused by technical problems which would soon be eliminated (101a-102a).

On January 7, 1970, Wiggins, Regional Sales Manager, was sent by Ford to meet with Pacifico, the acknowledged leader of the complaining dealers, to try to convince him that the terms of the deal with Plaintiffs were fair and not special concessions. Wiggins was authorized to offer the same deferred rent plan to Pacifico and the other dealers, which he did. Pacifico rejected Wiggins' offer of a deferred rent plan and persisted in his objections (P-75 117ex).

On January 9, 1970 Naughton, Vice President of Ford, met with the objecting dealers and heard their objections and threats. Although Ford considered the deal with Plaintiffs both reasonable and desirable to Ford (388a-389a), Naughton advised the dealers that, rather than face a group of angry dealers, he would kill the deal with Plaintiffs (183a-186a, 533a-534a, P-76 121ex). After the meeting, Matthews, a principal objecting dealer, wrote Naughton and confirmed the "agreement" reached at that meeting, one of the terms of which was stated to be that "the present deal with . . . [Plaintiffs] is a dead issue

and that Ford will continue to operate this facility as a Company Store until arrangements can be made to sell the location to a qualified buyer" (D-42 266-267ex). Plaintiffs were then notified that Ford would not go through with the Presidential deal upon the terms set forth in the documents at the December 18, 1969 meeting (p-76 122-123ex).

Thereafter, Plaintiffs were told by Ford that unless they signed a document releasing Ford from liability arising out of the Presidential transaction, their Chestnut franchise would be terminated and instead of getting their equity out of Chestnut as of the date of the fire, in which event Plaintiffs would receive approximately $85,000, their equity would be determined as of the end of the year, in which event Plaintiffs would receive nothing, because of the losses incurred while Chestnut was being liquidated in anticipation of the move to Presidential (107a-108a, 110a-115a). Plaintiffs refused to sign a release, and for that reason their Chestnut franchise was terminated (P-94 134ex). Plaintiffs, therefore, not only did not get the Presidential dealership, but their Chestnut dealership was taken from them, and they received nothing from the liquidation of Chestnut—not even their original $60,000 investment.

II. *Jury Findings*

The District Court posed a series of special interrogatories to the jury. The jury's answers which are relevant to the issues before this Court are the following:

> 1. The jury found that Plaintiffs and Ford entered into a contract on December 18, 1969 for the acquisition of Presidential Motors and its operation by Plaintiffs as franchised Ford dealers, which was contingent only upon approval of the deferred rent terms by a subsidiary of Ford, which approval was communicated to Plaintiffs on December 29, 1969. (Answer to Special Interrogatory No. 16, 827a-828a.)

2. The jury found that Ford's failure to deal with Plaintiffs on the terms set forth in the documents signed on December 18, 1969 was the result of a contract, combination or conspiracy entered into between Ford and the Philadelphia area Ford dealers. (Answer to Special Interrogatory No. 1, 823a.)

3. The jury found that the agreement between Ford and its dealers constituted an "unreasonable restraint of trade." (Answer to Special Interrogatory No. 3, 823a.) This finding, construed in the context of the definition of "unreasonable restraint of trade" contained in the charge of the trial judge (680a), constituted a finding that the agreement between Ford and its dealers had the purpose of stifling competition and was reasonably calculated to substantially restrict competition.

4. The jury found that the agreement between Ford and its dealers was a substantial factor in bringing about damages to Plaintiffs in the amount of $750,000. (Answers to Special Interrogatories Nos. 4 and 5, 824a.)

III. *Opinion of the District Court*

The District Court ruled that the jury's answers to Special Interrogatories established the existence of a group boycott, and therefore, a *per se* violation of Section 1 of the Sherman Act. Accordingly, the District Court entered judgment for Plaintiffs in the amount of $2,250,000 and denied Ford's motions for judgment n.o.v. or, in the alternative, for a new trial.

IV. *Opinion of the Court of Appeals*

The Court of Appeals, relying upon the language of the Ninth Circuit Court of Appeals in the case of *Joseph E. Seagram & Sons, Inc. v. Hawaiian Oke & Liquors, Ltd.*, 416 F.2d 71, 76 (9th Cir. 1969), *cert. den.*, 396 U.S. 1062 (1970),

held that an exclusionary or anti-competitive purpose is a requisite of a group boycott, and that the jury findings failed to establish the existence of the requisite "illicit purpose" (App. A, p. 13a). The Court further held that, as the result of concerted action, Plaintiffs ". . . were deprived simply of the benefits of a contract offered to them at special terms" (App. A, p. 15a), which, the Court concluded, did not constitute a violation of Section 1 of the Sherman Act. Accordingly, the Court of Appeals reversed the District Court's judgment for Plaintiffs and entered judgment n.o.v. for Ford.

REASONS FOR GRANTING PETITION

I. The Holding of the Third Circuit, that an Exclusionary or Anti-Competitive Purpose Is a Requisite of a Group Boycott under Section 1 of the Sherman Act, Is in Direct Contravention of the Holdings of this Court and Is in Conflict with a Decision of the Ninth Circuit.

A. *The Decision of the Court of Appeals Directly Contravenes the Decisions of this Court.*

Group boycotts, or concerted action resulting in a refusal to deal, were first recognized by this Court as one form of *per se* violation of Section 1 of the Sherman Act in *Northern Pacific Ry. v. United States*, 356 U.S. 1 (1958). The most recent case in which this Court dealt with a group boycott was *United States v. General Motors Corp.*, 384 U.S. 127 (1966). There, an auto manufacturer and its franchised dealers had conspired to deny nonfranchised (*i.e.*, discount) auto dealers access to new Chevrolets. The District Court had held that the concerted action did not constitute a group boycott and, therefore, was not a *per se* violation of the Sherman Act, because its *purpose* was not to eliminate the discounters, but to preserve General Motors' distribution system. On direct appeal, this Court reviewed its prior holdings and reversed the District Court, saying:

> "The principle of these [group boycott] cases is that where businessmen concert their actions in order to deprive others of access to merchandise which the latter wish to sell to the public, *we need not inquire into the economic motivation underlying their conduct.*" (*Id.* at 146). (Emphasis added).

The principle, that the purpose or motivation of a group is irrelevant to the existence of a prohibited group boycott, had been clearly enunciated previously by this Court in *Fashion Originators' Guild of America v. FTC*, 312 U.S. 457 (1941). In that case the Guild attempted to justify its group boycott on the ground that the boycott was aimed at preventing "style piracy", which the Guild's members regarded as a tort. This Court rejected that contention, holding that evidence of the purpose behind the boycott was irrelevant and, therefore, had been properly excluded in the proceedings below.

Notwithstanding the clear precedents of this Court, the Court of Appeals in the instant case held that:

> ". . . a concerted activity constitutes a 'group boycott' and is considered *per se* 'in restraint of trade' *when 'there [is] a purpose* either to exclude a person or group from the market, or to accomplish some other anti-competitive objective, or both.'" (Emphasis added). (App. A, p. 11a).

In holding that a specific purpose is a requisite of a group boycott, and in entering judgment n.o.v. because an "illicit purpose" had not been established, the Third Circuit flatly contravened the decisions of this Court. We respectfully submit, therefore, that it would be appropriate for this Court to reverse the Court of Appeals *per curiam*, and to reinstate the judgment of the District Court upon the citation of the *General Motors* and *Fashion Originators' Guild* cases, *supra*.

B. *The Decision of the Third Circuit in This Case is in Conflict With a Decision of the Ninth Circuit Court of Appeals.*

The only authority upon which the Court of Appeals based the above holding was language which it quoted from a decision of the Ninth Circuit Court of Appeals, *Joseph E. Seagram & Sons, Inc. v. Hawaiian Oke and Liquors, Ltd.*, 416 F.2d 71 (1969), *cert. den.*, 396 U.S. 1062 (1970). In citing *Seagram* as its authority, however, the Third Circuit overlooked the fact that *Seagram* was an exclusive distributorship case, a situation this Court has recognized to be *sui generis*: See *Klor's v. Broadway-Hale Stores*, 359 U.S. 207, 212 (1959). The Third Circuit itself had previously recognized this distinction and had cited *Seagram* as standing for the proposition that: ". . . a single manufacturer or seller can ordinarily stop doing business with A and transfer his business to B and that such a transfer is valid even though B may have solicited the transfer and even though the seller and B may have agreed to the seller's termination of A." (*Ark Dental Supply Co. v. Cavitron Corp.*, 461 F.2d 1093, 1094 [3rd Cir. 1972]).

Moreover, the Third Circuit overlooked the fact that the quoted language of *Seagram* has not even been adhered to by the Ninth Circuit, which authored it, in a non-exclusive distributorship situation. Just two years after *Seagram*, the Ninth Circuit decided *United States v. Hilton Hotels Corp.*, 467 F.2d 1000 (1972), *cert. den.*, 409 U.S. 1125 (1973). In the *Hilton* case, the defendant contended that certain concerted action did not constitute a group boycott because its *purpose* was not exclusionary or anti-competitive. The Ninth Circuit rejected this contention, stating:

> "But the necessary and direct consequence of defendants' scheme was to deprive uncooperative suppliers of the opportunity to sell to defendant hotels in free and open competition with other suppliers, and to deprive defendant hotels of the opportunity to buy supplies from such suppliers in accordance with the individual judgment of each hotel, at prices and on terms and conditions of sale determined by free competition. Defendants therefore 'intended' to impose these restraints upon competition in the only sense relevant here." (467 F.2d at 1002).
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> * * * * *
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> "The Sherman Act is aimed at consequences. Specific intent is not an element of any offense under the Act except attempt to monopolize under section 2, and conscious wrongdoing is not an element of that offense." (467 F.2d at 1005).

Thus, the decision of the Third Circuit in this case is not only in direct contravention of the decisions of this Court, it is also in conflict with a decision of the Ninth Circuit, upon whose authority the Third Circuit ostensibly relied.

II. The Court of Appeals, in Violation of the Seventh Amendment to the Constitution and the Decisions of this Court, Has Ignored a Jury Finding of an Anti-Competitive Purpose.

After erroneously concluding that this Court's decisions require an exclusionary or anti-competitive purpose, the Court of Appeals held that Plaintiffs' case failed because the jury had not found such a purpose. In so doing, the Court ignored a clear finding of the jury that such a purpose existed, and thereby violated the Seventh Amendment to the United States Constitution and prior holdings of this Court.

In *Gallick v. Baltimore & Ohio R. Co.*, 372 U.S. 108, 121-22 (1963), this Court held that a jury's answer to a special interrogatory must be looked at "in the context of the charge." Here the trial judge submitted Special Interrogatories to the jury and his Charge "tracked" the Inter-

rogatories; *i.e.*, in his Charge he instructed the jury he would submit a certain interrogatory to them and then he defined the terms used in that interrogatory to aid the jury in answering it. The third Interrogatory (which the jury was to answer only if it had found an agreement between Ford and its dealers) asked whether that agreement "constituted an unreasonable restraint of trade" (823a).

In his Charge the trial judge defined "unreasonable restraint of trade" as follows:

> "The antitrust laws are intended to stimulate competition for the benefit of the public. They are intended to ban any restraints which have the substantial purpose or effect of stifling competition. Therefore, restraints which have substantial purpose or effect of restraining competition are unreasonable restraints.
>
> "In determining whether an unreasonable restraint of trade exists you must decide whether the conduct in question substantially restricted or otherwise controlled free and open competition among Ford dealers in the Greater Philadelphia area, and in determining whether or not such an unreasonable restraint exists you need not find a specific public injury, but you must find that the conduct in question was reasonably calculated to substantially restrict or otherwise had the effect of restricting competition." (680a).

When the jury's "Yes" answer to Interrogatory No. 3 is looked at "in the context of the charge" of the trial judge, as this Court has held it must be, that answer is a clear finding that the agreement between Ford and its dealers had the "substantial purpose . . . of restraining competition." Thus, there *was* a jury finding of an anti-competitive purpose, thereby meeting the criteria of the *Seagram* case which the Third Circuit adopted.[1]

1. There was ample evidence to support the jury's finding of an anti-competitive purpose: *e.g.*, (1) the objecting dealers had attempted to get Ford to close Presidential altogether and had obtained for Ford a purchaser for the site who would use it other than as a car dealership (409a, 595a, 600a-601a, D-64, 287ex); (2) the other dealers not only objected to Ford selling Presidential to Plaintiffs, but they objected to Ford permitting Plaintiffs to reopen their prior dealership, Chestnut Motors (D-64, 286ex, 596-597a); and (3) some of the very dealers, who threatened to resign their dealerships if Ford went through with the deal with Plaintiffs for Presidential, had attempted to get Ford to sell Presidential to them, on terms far more favorable to them than the terms of Ford's deal with Plaintiffs (590a, 550a, 552-553a, 186a).

The Court of Appeals, however, refused to consider the jury's answer to Interrogatory No. 3 as a finding in support of the establishment of a group boycott, stating (App. A, p. 12a):

> ". . . plaintiffs' case was tried strictly on a theory of *per se* illegality and not under the 'rule of reason'. Thus, the district court held, and the parties agreed, that Interrogatory No. 3 was improvidently submitted to the jury."

This is not an accurate statement of what transpired at the trial and, in any event, would not justify the Court in ignoring its duty to construe the answers to Interrogatories in the context of the charge of the trial judge.

It is true that when the trial judge submitted to counsel the Interrogatories he proposed to submit to the jury, both counsel objected to his submitting Interrogatory No. 3 on the ground that the case had been tried on the theory of *per se* rather than "rule of reason" liability. The *reason* Plaintiffs' counsel objected was they assumed the trial judge would define "unreasonable restraint of trade" in terms of the "rule of reason" cases, which would have required Plaintiffs to produce evidence of "an incredibly complicated and prolonged economic investigation into the entire history of the industry involved, as well as related industries." (*U.S. v. Topco Associates*, 405 U.S. 596, 607 [1972]), something Plaintiffs had not attempted to do. Instead, the trial judge defined "unreasonable restraint of

trade" substantially in the language of the *Seagram* case, which language the Third Circuit here adopted.

Thus, what we have is the Court of Appeals adopting the test of the *Seagram* case, but rejecting the jury's answer to an Interrogatory which found that Plaintiffs had met that test. This is not only directly contrary to a prior holding of this Court which requires a reviewing court to construe answers to interrogatories "in the context of the charge" of the trial judge, but is a violation of the Seventh Amendment to the Constitution.

The Seventh Amendment provides that ". . . no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law." In *Atlantic & Gulf Stevedores v. Ellerman Lines*, 369 U.S. 355, 358-59 (1962), this Court held the Seventh Amendment to mean that an appellate court cannot "redetermine facts found by the jury"; and in *Gallick v. Baltimore & Ohio R. Co., supra*, this Court stated that a jury's finding of fact "whether it relates to negligence, causation or any other factual matter, *cannot be ignored*." (372 U.S. at 155) (Emphasis added). Here, the Court of Appeals explicitly ignored the jury's finding on a factual issue which the Court itself had found to be relevant.

In summary, even if the Third Circuit had been correct in determining that proof of an anti-competitive purpose is necessary in a group boycott case, Plaintiffs were deprived of their Constitutional right to a trial by jury when the Third Circuit failed to read the jury's finding in the context of the trial judge's Charge, and as a result ignored the jury's finding of an anti-competitive purpose.

III. The Court of Appeals Has Formulated a Major Exception to the Group Boycott Doctrine, in Conflict with the Decisions of This Court and of another Circuit Court.

A. *The Court of Appeals' Decision Contravenes Prior Decisions of This Court.*

In this case the Third Circuit, in addition to improperly holding that a specific purpose is a requisite of a group boycott, has also propounded a major exception to the group boycott prohibition, namely, that a group boycott is legal if it seeks to deprive a competitor of "special" terms which he has negotiated with a supplier; *i.e.*, that a group boycott is illegal *only* if it seeks to prevent a competitor from dealing with a supplier on substantially the same terms as group members enjoy. Specifically, the Third Circuit held:

> "Distilled to its essence, the group activity of Ford and its Philadelphia area dealers blocked only the 'special terms' arrangement between Ford and plaintiffs. Whatever common law right of action against the other Ford dealers for interference with a contract may have accrued to plaintiffs, the concerted action did not constitute a group boycott in the sense of a *per se* unreasonable restraint of trade. Plaintiffs were not deprived of the opportunity to become a Ford dealer or to purchase products on the same basis as other dealers. *They were deprived simply of the benefits of a contract offered to them at special terms. Such a deprivation, even if the product of concerted action, does not violate §1 of the Sherman Act.*" (App. A, p. 15a) (Emphasis added).

The Court of Appeals cited *no case in any court* holding that a distinction can or should be made between "special" deals or contracts and standard ones, or that only the latter are protected against group boycotts. Apparently the Court believed that all prior group boycott cases of this

Court dealt with standard opportunities, and thus, that the *per se* doctrine did not extend to protect businessmen who, as the result of concerted action, were denied the benefits of "special" deals.

The decisions of this Court dealing with group boycotts, however, do not suggest that it is appropriate for the courts to consider whether the opportunities of which a plaintiff is deprived by group action were equally available to his competitors. Rather, the opinion in *Silver v. New York Stock Exchange*, 373 U.S. 341 (1963), is to the contrary. Plaintiff in that case was a stock broker dealing in the over-the-counter market. He had installed private telephone wires to member firms of the New York Stock Exchange in order to facilitate business with such firms. When, as the result of concerted action, the Exchange ordered its members to rip out these connections, this Court said:

> "These important *business advantages* were taken away from petitioners by the group action of the Exchange and its members. Such 'concerted refusals by traders to deal with other traders . . . have long been held to be in the forbidden category' . . . ." (373 U.S. at 348). (Emphasis added).
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>
> "Nor does any excuse derive from the fact that the collective refusal to deal was only with reference to the private wires, the member firms remaining willing to deal with petitioners for the purchase and sale of securities [citations omitted]. A valuable service germane to petitioners' business and important to their effective competition with others was withheld from them by collective action. That is enough to create a violation of the Sherman Act." (373 U.S. at 348, note 5).

This Court in *Silver* was not concerned with whether other traders had been offered (or allowed to retain) direct

wires to Exchange member firms on equal terms with the plaintiff. Indeed, this Court referred to the direct wires of which plaintiff was deprived as "business *advantages*"—*i.e.*, special terms enjoyed by plaintiff but not by all of his competitors.

In its most recent group boycott case, the *General Motors* case, *supra*, this Court reviewed its prior decisions and enunciated their rationale in these words:

> "The principle of these cases is that where businessmen concert their actions in order to deprive others of access to merchandise which the latter wish to sell to the public, we need not inquire into the economic motivation underlying their conduct." (384 U.S. at 146).

By its decision in this case, the Third Circuit has in effect rewritten this Court's opinion in *General Motors* by inserting the words "*on equal terms*" after the words "deprive others of access to merchandise".

Such a rewriting is inconsistent not only with the *Silver* case, but with this Court's decisions involving another *per se* violation of Section 1 of the Sherman Act: price fixing. In that field, this Court has repeatedly beaten down attempts to justify the fixing of prices—even maximum prices—on the ground that:

> ". . . such agreements . . . cripple the freedom of traders and thereby restrain their ability to sell in accordance with their own judgment." *Kiefer-Stewart Co. v. Seagram & Sons*, 340 U.S. 211, 213 (1951).

The freedom of the Plaintiffs in this case to contract "in accordance with their own judgment" was not merely crippled, but annihilated, by the group boycott. Deprivation of economic freedom constitutes a *per se* violation of the Sherman Act whether it takes place because of price fixing or because of a group boycott.

B. *The Court of Appeals' Decision is in Conflict with a Decision of the Fifth Circuit.*

The decision of the Third Circuit in this case is also in conflict with the decision of the Fifth Circuit in *North Texas Producers' Ass'n v. Young*, 308 F.2d 234 (5th Cir. 1962), *cert. den.*, 372 U.S. 929 (1963). There, Young planned to go into business selling milk in one-gallon glass containers in the Dallas, Texas, area, whereas his competitors were all selling milk in half-gallon paper cartons. He contracted with the local milk producers association to sell him milk in one-gallon glass jugs. The association then refused to deal with Young under the terms of the contract because of pressure from other milk handlers and distributors in the area. In upholding a jury verdict for plaintiff against the challenge that he had only been deprived of a "special" deal, the Fifth Circuit said:

> "Factually, it is difficult to conceive how it may be logically argued that Young was seeking some special privilege or advantage not available to his competitors. It is not a special privilege or advantage to enter into the type of contract executed by Young and North Texas. To make a contract may be a privilege and certainly, the parties to it hope it will be advantageous, but we see nothing 'special' involved here. Further, *no valid reason has been given to indicate that the same privilege or advantage was not available to other handlers and distributors of milk. From aught that appears, they did not desire such a contract; or if so, no effort was made to obtain one.*" (308 F.2d at 241). (Emphasis added).

Exactly the same words should have been used by the Third Circuit to uphold the jury verdict in the instant case. There was nothing "special" about Ford's contract with Plaintiffs, nor was there anything to indicate that the other Ford dealers desired a contract comparable to Plaintiffs' or that they had made an effort to obtain one. Indeed, the

record is clearly to the contrary. The evidence in Ford's own case established that: (a) the other dealers rejected Ford's offer of substantially equal rental terms with respect to their own dealerships (P-75 119-120ex); and (b) when Presidential was offered to the other dealers, those who expressed interest in Presidential were interested only upon terms far more favorable to them than the terms of Ford's deal with Plaintiffs (550a, 552-553a). Far from trying to prevent the Plaintiffs from obtaining an unfair competitive advantage over them, the group members were trying to prevent the Plaintiffs from competing at all at the Presidential dealership.

In summary, this Court has never limited the group boycott prohibition to cases where a competitor is denied "standard" terms for goods or services it wishes to purchase. The clear implication of this Court's language in the *Silver* and *General Motors* cases, *supra*, is that *any* denial of goods and services brought about by pressures of competitors constitutes a group boycott in violation of the Sherman Act. In deciding to the contrary, the Third Circuit is also in conflict with the Fifth Circuit, which decided the *North Texas* case, *supra*.

IV. The Court of Appeals' Decision Emasculates the Group Boycott Prohibition and Violates the Public Policy Underlying the Sherman Act.

Since this Court, in *Northern Pacific Ry. v. United States*, 356 U.S. 1 (1958), first enunciated the doctrine that a group boycott is a *per se* violation of the Sherman Act, there have been a series of unsuccessful attempts by the lower federal courts to emasculate the group boycott prohibition. Thus, in *Klor's Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207 (1959), *Silver v. New York Stock Exchange*, 373 U.S. 341 (1963), and *United States v. General Motors Corp.*, 384 U.S. 127 (1966), the lower courts had carved out major exceptions to the application of the group boycott

doctrine. In each instance, however, this Court struck down those attempts and preserved the vitality of the doctrine. The decision of the Third Circuit in this case represents yet another attempt to emasculate the group boycott doctrine, and, we submit, should be treated in the same manner as prior attempts.

In holding that an "illicit purpose" is a requisite of a group boycott, and that the protection against group boycotts does not extend to "special" deals or arrangements, the Third Circuit has virtually eliminated the group boycott as an effective method of enforcing the Sherman Act. Every would-be antitrust violator can, and does, conjure up a praiseworthy motive for his conduct. By imposing a requirement of an "illicit purpose" the Third Circuit has erected a mountainous obstacle before a plaintiff attempting to prove a group boycott—one which this Court has held he need not climb.

Additionally, by holding that the protection against group boycotts extends only to regular arrangements and not to "special" arrangements, the Third Circuit has placed the lone businessman at the mercy of coercive conduct by his powerful and well organized competitors. Inasmuch as real estate has traditionally been viewed as unique or special, and inasmuch as many business arrangements involve the sale or lease of real estate, a great many commercial relationships would be subject to attack by a group boycott if "special" deals were not subject to Sherman Act protection. In the instant case, the primary point of the attack by Plaintiffs' competitors was the lease between Plaintiffs and a subsidiary of Ford. The building which Plaintiffs were to occupy was unique, and *any* provision for its sale or lease to Plaintiffs would similarly have been unique or "special", and thus, under the Third Circuit's rationale, immune from protection against group boycotts.

The other element of the deal between Plaintiffs and Ford which the group objected to was a term "special" to every agreement, whether or not it concerns real estate—the date for the investment of Plaintiffs' funds; *i.e.*, the date

of payment of the purchase price by the buyer. Since there is no standard interim period between the signing of a purchase agreement and the closing, the length of the interim period can always be considered a "special" term—and thus subject to concerted attack by competitors under the Third Circuit's ruling in this case.

The public policy underlying the Sherman Act is the encouragement of free and open competition among all businessmen. The decision of the Third Circuit runs afoul of that policy, however, by permitting a group of businessmen to exercise their collective muscle to deprive a competitor of the benefits of a business opportunity he has earned, and to justify their concerted action by saying that they had merely prevented him from gaining a business advantage over them. Such a result, we submit, is so contrary to the letter and spirit of the Sherman Act that this Court should exercise its certiorari power to prevent it from occurring.

CONCLUSION

For the foregoing reasons it is respectfully urged that a Writ of Certiorari be granted.

Respectfully Submitted,

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Appendix A—Opinion and Judgment of the United States Court of Appeals for the Third Circuit, Filed May 8, 1975

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 74-1877 and 74-1878

ARMEN DE FILIPPO and SHELDON FLEISHMAN
t/a A & S, a Partnership

v.

FORD MOTOR COMPANY, a Delaware Corporation
PRESIDENTIAL FORD, INC., a Delaware Corporation
FORD LEASING DEVELOPMENT CO., a Delaware Corporation,

FORD MOTOR COMPANY, *Appellant* in No. 74-1877

ARMEN DE FILIPPO and SHELDON FLEISHMAN
t/a A & S, a Partnership,
Appellants in No. 74-1878

v.

FORD MOTOR COMPANY, a Delaware Corporation
PRESIDENTIAL FORD, INC., a Delaware Corporation
FORD LEASING DEVELOPMENT CO., a Delaware Corporation.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA.
(District Court Civil Action No. 70-1003)

Argued March 17, 1975

Before: ALDISERT, GIBBONS and GARTH, *Circuit Judges.*

OPINION OF THE COURT

(Filed May 8, 1975)

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ALDISERT, *Circuit Judge.*

Cross appeals from a judgment entered after a jury's answers to special interrogatories require us to decide whether the district court erred (1) in applying a principle of *per se* unreasonableness to conduct of Ford Motor Company and certain Philadelphia area Ford dealers allegedly in violation of § 1 of the Sherman Act and (2) in applying

the Pennsylvania Statute of Frauds to defeat plaintiffs' recovery for breach of contract. We reverse the district court's resolution of the Sherman Act issue and affirm its action in interpreting the Uniform Commercial Code's Statute of Frauds.

Ford appeals from a judgment of $2,250,000 plus attorneys' fees of $384,357 entered for plaintiffs on a count charging that Ford and its Philadelphia dealers engaged in a concerted refusal to deal with plaintiffs, which constituted a *per se* violation of § 1 of the Sherman Act.[1] Plaintiffs Armen De Filippo and Sheldon Fleishman appeal from the entry of judgment for defendant as a matter of law on the count alleging breach of contract by Ford for the sale of a Ford dealership known as Presidential Motors.

I.

Plaintiffs became Ford dealers at Chestnut Motors, Inc. in West Philadelphia in 1969. Less than nine months later part of the facilities, leased from the previous dealer, was destroyed by fire. Thereupon plaintiffs and Ford discussed the possibility of plaintiffs' acquiring another dealership in the city. On December 18, 1969, plaintiffs signed an instrument, found by the jury to be a contract, according to which they were to purchase the assets, less realty, of Presidential Motors. The real estate was to be leased by plaintiffs from Ford. The instrument also contemplated that plaintiffs would be credited with the value of their interest at Chestnut undiminished by the fire;[2] that no risk capital would be invested by plaintiffs for an original period of three (3) months, after which they would put in twenty per cent (20%) of the capital; and that plaintiffs

1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal . . . .

15 U.S.C. § 1 (1970).

2. It is unclear whether the amount assigned to this value was approximately $85,000 or $100,000. *Compare* Appellant's Brief at 4 and Appellees' Brief at 6 *with* N.T. 475. The discrepancy in the figure, however, need not detain us as it is immaterial to our resolution of the issues.

would defer payment of fifty per cent (50%) of the first year's rent and twenty-five per cent (25%) of the second year's rent until the fourth and fifth years of the dealership.

When news of the proposal reached other Philadelphia area Ford dealers, they protested to Ford the delayed investment and deferred rent provisions. Ford's legal department advised Ford that the deferred rent provision was unacceptable unless also offered to other dealers, obviously fearing a conflict with the Robinson-Patman Act.[3] Thereafter Ford's representatives discussed the possibility of deferred rent plans with other dealers. Ford even considered the purchase and lease-back of dealer-owned real estate so that the deferred rents could be offered to all dealers. Significantly, it is clear from the record that any implementation of the plans was contingent upon acceptance of plaintiffs' proposal.

Further problems, however, were posed by dealers who did not wish to sell to and lease back from Ford, and by dealers who believed that they might be injured as a result of the delayed investment feature of the Presidential proposal. Ultimately, therefore, the vice-president and general manager of Ford travelled to Philadelphia, announced to the Philadelphia dealers that Ford would not consum-

3. 15 U.S.C. § 13 (1970):

. . .

(d) Payment for services or facilities for processing or sale.

It shall be unlawful for any person engaged in commerce to pay or contract for the payment of anything of value to or for the benefit of a customer of such person in the course of such commerce as compensation or in consideration for any services or facilities furnished by or through such customer in connection with the processing, handling, sale, or offering for sale of any products or commodities manufactured, sold, or offered for sale by such person, unless such payment or consideration is available on proportionally equal terms to all other customers competing in the distribution of such products or commodities.

(e) Furnishing services or facilities for processing, handling, etc.

It shall be unlawful for any person to discriminate in favor of one purchaser against another purchaser or purchasers of a commodity bought for resale, with or without processing, by contracting to furnish or furnishing, or by contributing to the furnishing of, any services or facilities connected with the processing, handling, sale, or offering for sale of such commodity so purchased upon terms not accorded to all purchasers on proportionally equal terms.

mate the Presidential proposal with plaintiffs, and instructed the Philadelphia sales manager that he had no objection to plaintiffs' assuming the Presidential dealership without the delayed investment and deferred rental terms. Plaintiffs made no response to an offer to discuss such a deal. They then filed this lawsuit, including a Sherman Act count, a count for breach of contract, and a count asserting a violation of the Automobile Dealers' Day in Court Act.[4]

After the jury answered special interrogatories, the court entered judgment for plaintiffs on the Sherman Act count. Based on the jury's responses, the court also entered an initial judgment for plaintiffs on the contract claim. However, it thereafter "molded" a verdict for Ford, ruling as a matter of law that the lack of Ford's signature rendered the instrument unenforceable against Ford for noncompliance with the Statute of Frauds provision of the U.C.C. relating to sale of goods.[5] The jury

4. 15 U.S.C. § 1222 (1970). Authorization of suits against manufacturers; amount of recovery; defenses.

An automobile dealer may bring suit against any automobile manufacturer engaged in commerce, in any district court of the United States in the district in which said manufacturer resides, or is found, or has an agent, without respect to the amount in controversy, and shall recover the damages by him sustained and the cost of suit by reason of the failure of said automobile manufacturer from and after August 8, 1956 to act in good faith in performing or complying with any of the terms or provisions of the franchise, or in terminating, canceling, or not renewing the franchise with said dealer: *Provided*, That in any such suit the manufacturer shall not be barred from asserting in defense of any such action the failure of the dealer to act in good faith.

5. PA. STAT. ANN. tit. 12A, § 2-201 (1970). Formal Requirements; Statute of Frauds

(1) Except as otherwise provided in this section a contract for the sale of goods for the price of $500 or more is not enforceable by way of action or defense unless there is some writing sufficient to indicate that a contract for sale has been made between the parties and signed by the party against whom enforcement is sought or by his authorized agent or broker. A writing is not insufficient because it omits or incorrectly states a term agreed upon but the contract is not enforceable under this paragraph beyond the quantity of goods shown in such writing.

(2) Between merchants if within a reasonable time a writing in confirmation of the contract and sufficient against the sender is received and the party receiving it has reason to know its contents, it satisfies the requirements of subsection (1) against such party unless written notice of objection to its contents is given within ten days after it is received.

found a violation of the Dealers' Day in Court Act, but also found plaintiffs sustained no damages therefrom.[6]

II.

In order to apply the provisions of the Sherman Act to the facts as found by the jury, it is first necessary to consider the teachings of the Supreme Court. On its face § 1 of the Sherman Act prohibits "[e]very contract, combination . . . or conspiracy, in restraint of trade or commerce among the several States." The necessity for some sort of narrowing interpretation of this language was pointed out by Mr. Justice Brandeis in *Chicago Board of Trade v. United States*, 246 U.S. 231, 238 (1918), where he observed that "[*e*]*very* agreement concerning trade, every regulation of trade, restrains." (Emphasis added). As the Court has explained through Mr. Justice Black, the result has been that "the courts have construed [§ 1] as precluding only those contracts or combinations which 'unreasonably' restrain competition." *Northern Pacific Ry. v. United States*, 356 U.S. 1, 5 (1958).

In certain situations the Court has presumed the required "unreasonableness"; that is, the Court has determined that the situations constitute *per se* violations of § 1. As explained by Mr. Justice Black:

> [T]here are certain agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without

5. (Cont'd.)

(3) A contract which does not satisfy the requirements of subsection (1) but which is valid in other respects is enforceable

. . .

(b) if the party against whom enforcement is sought admits in his pleading, testimony or otherwise in court that a contract for sale was made, but the contract is not enforceable under this provision beyond the quantity of goods admitted; or

(c) with respect to goods for which payment has been made and accepted or which have been received and accepted (Section 2-606).

6. The court directed a judgment in favor of the two other named defendants.

> elaborate inquiry as to the precise harm they have caused or the business excuse for their use. . . . Among the practices which the courts have heretofore deemed to be unlawful in and of themselves are price fixing, *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 210; division of markets, *United States v. Addyston Pipe & Steel Co.*, 85 F. 271, aff'd, 175 U.S. 211; group boycotts, *Fashion Originators' Guild v. Federal Trade Comm'n*, 312 U.S. 457; and tying arrangements, *International Salt Co. v. United States*, 332 U.S. 392.

Ibid.

Addressing the specific type of activity upon which plaintiffs relied to bring this case within the ambit of *per se* unreasonableness, the Court teaches:

> Group boycotts, or concerted refusals by traders to deal with other traders, have long been held to be in the forbidden category.[5] They have not been saved by allegations that they were reasonable in the specific circumstances, nor by a failure to show that they "fixed or regulated prices, parcelled out or limited production, or brought about a deterioration in quality." *Fashion Originators' Guild v. Federal Trade Comm'n*, 312 U.S. 457, 466, 467-468. Cf. *United States v. Trenton Potteries Co.*, 273 U.S. 392. Even when they operated to lower prices or temporarily to stimulate competition they were banned. For, as this Court said in *Kiefer-Stewart Co. v. Seagram & Sons*, 340 U.S. 211, 213, "such agreements, no less than those to fix minimum prices, cripple the freedom of traders and thereby restrain their ability to sell in accordance with

5. See, *e.g.*, *Eastern States Lumber Assn. v. United States*, 234 U.S. 600; *Binderup v. Pathe Exchange, Inc.*, 263 U.S. 291; *Fashion Originators' Guild v. Federal Trade Comm'n*, 312 U.S. 457; *Kiefer-Stewart Co. v. Seagram & Sons*, 340 U.S. 211, 214; *Times-Picayune Publishing Co. v. United States*, 345 U.S. 594, 625; *Northern Pacific R. Co. v. United States*, 356 U.S. 1, 5.

> their own judgment." Cf. *United States v. Patten*, 226 U.S. 525, 542.

Klor's, Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207, 212 (1959).

The inquiry in any case seeking to apply this rule of *per se* unreasonableness must be whether or not the activities of defendants properly fall within the "group boycott" categorization. The necessity for careful delineation of the boundaries of this *per se* category was aptly expressed in *Worthen Bank & Trust Co. v. National BankAmericard, Inc.*, 485 F.2d 119, 125 (8th Cir. 1973), *cert. denied*, 415 U.S. 918 (1974):

> The term "group boycott" . . . is in reality a very broad label for divergent types of concerted activity. To outlaw certain types of business conduct merely by attaching the "group boycott" and "per se" labels obviously invites the chance that certain types of reasonable concerted activity will be proscribed.

Accordingly, we have reviewed the case law employing the group boycott concept.

In *Fashion Originators' Guild of America, Inc. v. Federal Trade Comm'n*, 312 U.S. 457 (1941), the members of a large association of textile and garment manufacturers refused to sell to certain retailers. The clear purpose of the combination was the "intentional destruction of one type of manufacture and sale which competed with Guild members." *Ibid.* at 467. In addition, the Court noted the "many respects" in which the activities of the Guild ran afoul of the policies of the antitrust laws, including their "tendency to monopoly." *Ibid.* at 465, 467.

In the early case of *Binderup v. Pathe Exchange, Inc.*, 263 U.S. 291 (1923), a national organization of motion picture film distributors, deciding not to sell to an exhibitor, "put an end to his participation in that business." *Ibid.* at 311.

Klor's, supra, also involved exclusion of a dealer from the market. In that case manufacturers and distributors of electrical appliances allegedly had conspired with a major retailer, Broadway-Hale, either not to sell to Klor's or to sell to it only at discriminatory prices, and had taken from Klor's "its freedom to buy appliances in an open competitive market and drive[n] it out of business as a dealer in the defendants' products." 359 U.S. at 213. The Court further emphasized that the group activity alleged was "not a case of a single trader refusing to deal with another, nor even of a manufacturer and a dealer agreeing to an exclusive distributorship," *ibid.* at 212, but rather a "wide combination consisting of manufacturers, distributors and a retailer." *Ibid.* at 213.

Eastern States Retail Lumber Dealers' Ass'n v. United States, 234 U.S. 600 (1914), involved the attempted coercion of wholesalers by an association of lumber retailers who refrained from dealing with those wholesalers that were selling directly to consumers.

More recently in *United States v. General Motors Corp.,* 384 U.S. 127, 146 (1966), the Court has instructed that "[t]he principle of these cases is that where businessmen concert their actions in order to deprive others of access to merchandise which the latter wish to sell to the public, we need not inquire into the economic motivation underlying their conduct." There, the agreement was to eliminate sales by General Motors' dealers to discounters. The Court emphasized that "inherent in the success of the combination . . . was a substantial restraint upon price competition . . . ." *Ibid.* at 147.

Kiefer-Stewart Co. v. Seagram & Sons, Inc., 340 U.S. 211 (1951), also involved a restraint upon price competition. The complaint charged an agreement or conspiracy "to sell liquor only to those . . . wholesalers who would resell at prices [below maxima] fixed by [defendants], and that this agreement deprived [plaintiff] of a continuing supply of liquor." *Ibid.* at 212. The Court reinstated a judgment for plaintiff.

From all this we are able to conclude that a concerted activity constitutes a "group boycott" and is considered *per se* "in restraint of trade" when "there [is] a purpose either to exclude a person or group from the market, or to accomplish some other anti-competitive objective, or both." *Joseph E. Seagram & Sons, Inc. v. Hawaiian Oke & Liquors, Ltd.,* 416 F.2d 71, 76 (9th Cir. 1969), *cert. denied,* 396 U.S. 1062 (1970), cited with approval in *Ark Dental Supply Co. v. Cavitron Corp.,* 461 F.2d 1093, 1094 (3d Cir. 1972) (per curiam).

III.

In the case at hand the district court submitted the issue of antitrust liability to the jury by three special interrogatories and the jury answered as follows:

1. Do you find that the plaintiffs have established by a preponderance of the evidence that Ford's failure to deal with the plaintiffs on the terms set forth in the documents signed by plaintiffs on December 18, 1969, was the result of a contract, combination or conspiracy entered into between Ford and the Philadelphia area Ford dealers?

   Yes X No ____

   If you have answered question 1 "Yes", then proceed to answer question 2.

   If you have answered question 1 "No", then proceed to answer question 7 [which concerned plaintiffs' claim under the Automobile Dealers' Act].

2. Do you find that plaintiffs have shown by a preponderance of the evidence that the purpose of the agreement, if any, between Ford and its Philadelphia area dealers was to prevent plaintiffs from becoming Ford dealers in the greater Philadelphia area on any terms?

   Yes ____ No X

If you have answered question 2 "Yes", then proceed to answer question 4 [which concerned antitrust injury and causation].

If you have answered question 2 "No", then proceed to answer question 3.

3. Do you find that plaintiffs have shown by a preponderance of the evidence that the agreement, if any, between Ford and its dealers to reject plaintiffs' terms for the acquisition of Presidential's assets constituted an unreasonable restraint of trade?

Yes X No ____

If you have answered question 3 "Yes", then proceed to answer question 4.

If you have answered questions 2 and 3 "No", then proceed to answer question 7.

We quickly reject appellees' contention that the jury's affirmative answers to interrogatories Nos. 1 and 3 in this case constitute a sufficient factual finding by the jury to sustain the judgment of antitrust liability. Appellees' Brief at 16. The first interrogatory was clearly limited to the element of agreement; the jury found only a "contract, combination, or conspiracy entered into between Ford and the Philadelphia area Ford dealers." Second, plaintiffs' case was tried strictly on a theory of *per se* illegality and not under the "rule of reason". Thus the district court held, and the parties agreed, that interrogatory No. 3 was improvidently submitted to the jury.

Thus, the sole inquiry before the district court, as it is before us, was whether there is a factual basis for sustaining the contention that the combined action of Ford and the other Philadelphia dealers constituted a "group boycott", as that category has been defined by the teachings of the Supreme Court.

IV.

The jury found as a fact that the purpose of the combination was *not* "to prevent plaintiffs from becoming Ford dealers in the greater Philadelphia area *on any terms.*" (emphasis added). The district court properly observed:

> The present agreement did not appear to take from plaintiffs their access to Ford dealerships in an "open competitive market;" it merely prevented plaintiffs from acquiring a dealership on special terms. Nor did the present agreement seem to deprive Ford of its freedom to sell to plaintiffs "at the same prices and conditions made available to [its other dealers]."

DeFilippo v. Ford Motor Co., 378 F. Supp. 456, 463 (E.D. Pa. 1974).

The district court, however, apparently found the illicit purpose of the combination to emerge from (1) the withdrawal of the offer to plaintiffs of special terms for delayed investment capital and deferred rentals and (2) a finding by the court—and not by the jury—"that these terms, or substantially equal terms, were offered to the other dealers." *Ibid.* at 464; *see ibid.* at 466.

Even assuming the propriety, in a post-trial jural environment, of a trial court's assumption of a fact-finding role entrusted in the case at hand to a jury, the district court's fact finding simply cannot be sustained. It is not supported in the record.

The court found such support in an offer made to one Kerry Pacifico by Dennis Wiggins, the Ford regional manager, on January 7, 1970. Appellant effectively responds:

> It is this conversation of January 7 upon which Judge Newcomer placed primary reliance for his finding that Ford was willing to deal with plaintiffs' competitors on terms it rejected when proposed by plaintiffs [*ibid.* at 465]. He quoted from Wiggins'

testimony, but the key portion of the passage makes clear that Ford was willing to offer other dealers deferred rent *only* in the event that it first *accepted* plaintiffs' proposal:

> "Q. O.K., Well, this problem that you considered the most important one, the one about the deferred rent that *if you offered it to Armen and Shelley* you'd have to offer it to everybody?
>
> A. Yes.
>
> Q. Well, you kind of already had gone partway on that in your January 7th meeting with Mr. Pacifico. You'd already told him that *if the deal went through* with Armen and Shelley he could have the same deal and you'd buy his place?
>
> A. Yes." (618a-19a; emphasis added)

Wiggins' testimony does not establish, as the lower court suggests, that Ford was willing to grant rent concessions to other dealers but not to plaintiffs —or that Ford was unwilling to deal with plaintiffs on terms equal to those provided to other dealers. On the contrary, it shows that, to assure equal treatment of all dealers, Ford was willing to make the same rent concession available to them *conditional* upon Ford's acceptance of the deferred rent proposal made by plaintiffs.

Appellant's Brief at 14-15 (footnote omitted) (emphasis in brief).

Other evidence cited by the court in support of its conclusion, 378 F. Supp. at 465, that the deferred rent plan was re-offered to other dealers after plaintiffs' offer had been rejected does not withstand examination. That evidence consists of plaintiffs' repeated attempts to establish this point on cross-examination of a Ford dealer, James Matthews, with the witness' repeated response: "I do not recall . . . . I do not know. . . . I can't answer that. I

do not know. . . . I do not know, sir." Appendix at 422a-24a. A disavowal of knowledge may not serve as a legitimate substitute for positive evidence. Moreover, the statement that "[t]hey did have a rent-concession policy that they used under certain conditions, if it was in order . . . .", *ibid.* at 423a, is no more supportive of the district court's conclusion than Wiggins' testimony.

The district court erred in assuming a conclusion, contrary to the evidence adduced at trial, to support its legal determination of an illicit group boycott.

Distilled to its essence, the group activity of Ford and its Philadelphia area dealers blocked only the "special terms" arrangement between Ford and plaintiffs. Whatever common law right of action against the other Ford dealers for interference with a contract may have accrued to plaintiffs, the concerted action did not constitute a group boycott in the sense of a *per se* unreasonable restraint of trade. Plaintiffs were not deprived of the opportunity to become a Ford dealer or to purchase products on the same basis as other dealers. They were deprived simply of the benefits of a contract offered to them at special terms. Such a deprivation, even if the product of concerted action, does not violate § 1 of the Sherman Act. *See* Part II, *supra*. Having failed to prove their case, plaintiffs are not entitled to recovery and the judgment in their favor on the Sherman § 1 count will be reversed.

Since we determine that the district court erred in entering judgment for plaintiffs on the basic antitrust claim, we also must set aside the award of $354,357 in attorneys' fees. 15 U.S.C. § 15 (1970); *see Byram Concretanks, Inc. v. Warren Concrete Products Co.*, 374 F.2d 649 (3d Cir. 1967).

V.

We next turn to plaintiffs' cross appeal urging as error the district court's ruling that any contract between plaintiffs and Ford was unenforceable under the Pennsyl-

vania Statute of Frauds because the instrument was not signed by Ford.

After several weeks of negotiations, the parties met on December 18, 1969. Plaintiffs had been under the impression the meeting would culminate in a contract for their acquisition of Presidential Motors. Instead, during the meeting they signed an instrument in letter form stating, *inter alia:* "The undersigned partnership hereby offers to purchase" the assets described in an accompanying exhibit, and "If the offer is accepted by you, the partnership shall have the right to assign its interest therein to" a Dealer Development corporation. Appendix at 170ex. The jury concluded from this evidence that the parties had entered a contract on December 18th, answering the following interrogatory in the affirmative:

> 16. Do you find that plaintiffs have shown by a preponderance of the evidence that, at the December 18, 1969 meeting at the offices of Wolf, Block, Schorr and Solis-Cohen, plaintiffs and defendant entered into a contract for the acquisition of Presidential Motors and its operation by plaintiffs as franchised Ford dealers which was contingent only upon approval of the deferred rent terms by Leaseco, which approval was communicated to plaintiffs on December 29, 1969?

Although we think the sufficiency of the evidence supporting this finding is suspect, and the existence of a contract at best tenuous, we approach the question from the same perspective as the district court: Assuming there to be a contract, is it enforceable?

The district court concluded that the nature of the alleged contract—involving a sale of goods for a purchase price of more than $500 and a lease in excess of three years in duration—subjected it to two provisions of Pennsylvania's Statute of Frauds. PA. STAT. ANN. tit. 12A, § 2-201 (1970); *ibid.*, tit. 68, §§ 250.201-250.203 (1965). On

appeal, Ford contends initially that the district court was correct. Alternatively, Ford urges that the alleged contract was one for the sale of a business which is a contract for the sale of "personal property", and that, in the absence of a signed written memorandum, the U.C.C. limits plaintiffs' recovery to $5,000. *Ibid.*, tit. 12A, § 1-206 (1970); *see Olympic Junior, Inc. v. David Crystal, Inc.*, 463 F.2d 1141, 1144-45 (3d Cir. 1972).

Whether the December 18th instrument was subject to the U.C.C. Statute of Frauds for the sale of goods, *see* n. 5 *supra*, as the trial court concluded, depends on whether the subject matter of the sale falls within the contemplation of "goods" as that term is defined in U.C.C. § 2-105, PA. STAT. ANN. tit. 12A, § 2-105 (1970).[7] Accordingly, our analysis begins with an examination of the documents involved in the December 18th transaction.

Accompanying the letter signed by plaintiffs were several exhibits, the principal one of which was entitled, "ASSETS TO BE SOLD AND COMPUTATION PRICE". The docu-

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7. Section 2-105 provides in part:

> (1) "Goods" means all things (including specially manufactured goods) which are movable at the time of identification to the contract for sale other than the money in which the price is to be paid, investment securities (Article 8) and things in action. "Goods" also includes the unborn young of animals and growing crops and other identified things attached to realty as described in the section on goods to be severed from realty (Section 2-107).
>
> (2) Goods must be both existing and identified before any interest in them can pass. Goods which are not both existing and identified are "future" goods. A purported present sale of future goods or of any interest therein operates as a contract to sell.
>
> (3) There may be a sale of a part interest in existing identified goods.

The official comment to the section amplifies as follows:

> 1. Subsection (1) on "goods": The phraseology of the prior uniform statutory provision has been changed so that:
>
> The definition of goods is based on the concept of movability and the term "chattels personal" is not used. It is not intended to deal with things which are not fairly identifiable as movables before the contract is performed.
>
> . . .
>
> The use of the word "fixtures" is avoided in view of the diversity of definitions of that term. This Article in including within its scope "things attached to realty" adds the further test that they must be capable of severance without material harm thereto. As between the parties any identified things which fall within that definition becomes "goods" upon the making of the contract for sale.

ment listed: parts and accessories, miscellaneous inventories, work in process, equipment, leasehold improvements, service vehicles, new vehicles, demonstrators, used vehicles, daily rental vehicles, leased vehicles, notes receivables, vehicle receivables, parts and service receivables, contracts covering services, and used car warranties. The exhibit also established a formula for deferring rent on the premises owned by Ford's subsidiary, Leaseco, specifically set forth a method for computing the cost of inventories, and provided: "The purchase price to be paid by the Buyer for the assets to be sold shall be the aggregate sum determined in accordance with the computations and the inventories to be made as specified herein, less $65,000."[8] Appendix at 186ex.

The parties agree that Pennsylvania law governs the contract issue. Although no Pennsylvania cases under U.C.C. § 2-105 treat the transfer of the assets of an automobile dealership, the Pennsylvania courts had held that the prior Sales Act governed the sale of a whole business. *See, e.g., Siskin v. Cohen,* 363 Pa. 580, 582, 70 A.2d 293, 294-95 (1950). In addition, other jurisdictions have held that motor vehicles are "goods". *Park County Implement Co. v. Craig,* 397 P.2d 800, 802 (Wyo. 1964); *English v. Ford,* 17 Cal. App. 3d 1038, 1046, 95 Cal. Rptr. 501, 505 (1971).

For their part, plaintiffs claim an analogue in *Field v. Golden Triangle Broadcasting, Inc.,* 451 Pa. 410, 305 A.2d 689 (1973), *cert. denied,* 414 U.S. 1158 (1974). There, the Pennsylvania Supreme Court was concerned with an agreement for the sale of two radio stations, including FCC licenses and various physical assets. The seller sought to invoke those provisions of the U.C.C. which allow a seller to demand adequate assurance of performance and, in the absence thereof, to suspend his performance. U.C.C. § 2-609, PA. STAT. ANN. tit. 12A, § 2-609 (1970). The court

8. The Buyer was to receive the leasehold improvements valued at $35,000 at no additional charge. Appendix at 144ex, 173ex.

stated: "We do not believe that Article 2 of the UCC applies to the instant contract. Rather than being an agreement for the sale of 'goods', this is a contract for the sale of the businesses of two radio stations, including their tangible and intangible assets, as a going concern." 451 Pa. at 422, 305 A.2d at 696.

We believe that *Field* offers plaintiffs little comfort for two reasons. First, the above quoted statement is not a strong holding, but mere dictum, for the court ultimately found:

> [W]e have already indicated that the security which is provided for the entire contract is adequate. . . . Clearly, where adequate assurance of performance is already present, and there has been no change in circumstances to give rise to reasonable grounds for insecurity, a demand for additional security under section 2-609 is not justified.

Ibid. at 424, 305 A.2d at 696-97. Second, the factual complex in Field is distinct from that in the instant case. There, only $30,000 of the total purchase price of $650,000 —or 4.6 per cent—represented physical assets, including non-movables such as towers and fences. This is to be contrasted with the proposed sale of Presidential Motors in which, we agree with Ford's assessment, the value of movables to be sold was well in excess of three times the value of assets not properly classified as "goods".[9]

For the Statute of Frauds relating to the sale of goods to become applicable, we do not believe every asset subject

9. The purchase price for Presidential was accounted for entirely by inventory and equipment (i.e., "goods") with the single exception of certain receivables . . . These receivables had a net value of only $76,828 . . . . This amount for "non-goods" was much less than the value of the "goods" plaintiffs were purchasing. The net asset value of the inventory alone (excluding the new cars, trucks and demonstrator vehicles which would have been financed and thus not paid for by part of the purchase price) amounted to $254,189 . . . . To this should be added the net asset value of the equipment plaintiffs offered to purchase which cannot be calculated precisely from Exhibit D-108 because the equipment value stated there included diagnostic equipment which plaintiffs were not purchasing . . . . Ford's reply brief at 31 n.36 (record references omitted).

to the sale must qualify under the "movable" test of U.C.C. § 2-105. *See* n.7 *supra*. Rather than a view of mechanical technicality or of mathematical nicety, a view of the reasonable totality of the circumstances should control the characterization of the contract for sale. If, viewed as a whole, it can be concluded that the essential bulk of the assets to be transferred qualify as "goods", then it is appropriate to consider the transaction a "contract for the sale of goods". To insist that all assets qualify as "goods" would substantially thwart the intentions of the drafters of the Uniform Commercial Code; it would sanction the absurd. The agreement of sale and purchase could cover physical, movable assets, thus qualifying as "goods", as well as other assets—such as receivables from their particular lines—not so qualifying. But to segregate "goods" assets from "non-goods" assets, and to insist that the Statute of Frauds apply only to a portion of the contract, would be to make the contract divisible and impossible of performance within the intention of the parties.

We believe it preferable to utilize a rule of reasonable characterization of the transaction as a whole. Applying this rule to the facts before us and carefully examining the list of assets to be sold, we note that title to no real estate was to pass in the transaction, nor was any value assigned for good will or the value of the business as a going concern. Accordingly, we have no hesitation in agreeing with the district court's applying U.C.C. § 2-201 and its finding that the alleged contract was unenforceable for want of the signature of Ford Motor Company.[10]

VI.

Finally, we reject cross-appellants' argument for a new trial limited to damages for the violation of the Dealers' Day in Court Act. We are persuaded that the question of damages was properly presented to and fully addressed by the jury.

10. Because of the view we take, it is unnecessary to reach the applicability of U.C.C. § 1-206 or of the Statute of Frauds relating to leases of more than three years in duration.

This issue is controlled by the interrogatory submitted to the jury:

> 12. What figure, if any, do you find accurately represents the value of plaintiffs' interest in Chestnut Motors on the date plaintiffs were terminated as dealers?
>
> A. None.

Plaintiffs had become Ford dealers at Chestnut Motors, Inc., in West Philadelphia early in 1969 under a "Dealer Development" arrangement in which they put up twenty per cent (20%), or $60,200, and Ford put up eighty per cent (80%) of the investment required to purchase the dealership from the previous dealer. Under the plan, plaintiffs were to buy out Ford's interest with dealership profits, if any. Fire destroyed part of the Chestnut Street facilities, which were leased from the previous dealer, only eight and one-half months after plaintiffs entered the venture. During the negotiations for the purchase of Presidential Motors subsequent to the fire, the parties agreed that plaintiffs would be credited with their interest in Chestnut "valued as of the date of the fire (and undiminished by losses suffered in the subsequent distress operations)." Appellant's Brief at 4; *see* n.2 *supra*. The figure assigned to this value, however, is not controlling on the instant question for two reasons. First, it was an item for negotiations preliminary to contract. Second, and more importantly, any damages to which plaintiffs might have been entitled under the Dealers' Day in Court Act would have to be assessed as of the date of the wrongful termination—April 9, 1970.

Trial testimony revealed that the Chestnut Street operation was officially closed down as of March 1, 1970. *E.g.*, Appendix at 371a. Also in evidence and available

for the jury's consideration was a certified public accountant's revised and corrected Statement of Income (Loss) for Chestnut Motors during the four-month period ending April 30, 1970. This document showed net sales of $403,873 and a cost of sales of $421,468—or a gross sales loss of $17,595. Added to this were selling, general and administrative expenses of $172,125, or a total loss from operations of $189,720. Other expenses amounted to $3,236, resulting in a net loss for the period of $192,956. Appendix at 341ex. From this information, the jury could well have found that, by the time Ford terminated plaintiffs' franchise at Chestnut Motors on April 9, 1970, post-fire losses had reduced the value of plaintiffs' interest in the operation to zero. Under these circumstances, we cannot disturb the jury's determination that plaintiffs should recover no damages under the Dealers' Day in Court Act.[11]

VII.

We have considered carefully all other contentions of the cross-appellants and find them devoid of merit.

The judgment of the district court will be reversed with a direction to enter judgment in favor of appellant Ford Motor Company.

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11. The jury, by its answers to Interrogatory Nos. 7 and 11, found that Ford had not acted in good faith in terminating the Chestnut Motors dealership. Notwithstanding however, the jury found that plaintiffs suffered no damages. The district court thereupon properly molded the verdict to enter judgment for Ford. This judgment is consistent with the jury's responses. F.R. Civ. P. 49(a); *see Halprin v. Mora*, 231 F.2d 197 (3d Cir. 1956); *Voelkel v. Bennet*, 31 F. Supp. 506, 510 (E.D. Pa.), *aff'd*, 115 F.2d 102 (3d Cir. 1940).

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit.

IN THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 74-1877 and 74-1878

ARMEN DE FILIPPO and SHELDON FLEISHMAN t/a
A & S, a Partnership

vs.

FORD MOTOR COMPANY, a Delaware Corporation
PRESIDENTIAL FORD, INC., a Delaware Corporation
FORD LEASING DEVELOPMENT CO.,
a Delaware Corporation
Ford Motor Company, Appellant in *No. 74-1877*

Armen De Filippo and Sheldon Fleishman t/a
A & S, a Partnership, Appellants in *No. 74-1878*

(D. C. Civil Action No. 70-1003)

On Appeal From The United States District Court
For The Eastern District of Pennsylvania

Present: ALDISERT, GIBBONS and GARTH, *Circuit Judges.*

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court against Ford Motor Company on the §1 Sherman Act claim filed November 20, 1973 and the order of June 14, 1974, insofar, as it awards counsel fees, be, and the same are hereby reversed, and the cause is remanded to the said District Court with a direction to enter judgment in

favor of appellant Ford Motor Company. Costs taxed against appellees in No. 74-1877 and against appellants in No. 74-1878.

ATTEST:

May 8, 1975

Clerk

Appendix B—Order of the United States Court of Appeals for the Third Circuit Denying Rehearing In Banc, Filed June 10, 1975

IN THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 74-1877

ARMEN DE FILIPPO, *et al.*,

v.

FORD MOTOR CO., etc., *et al.*,
FORD MOTOR CO., *Appellant*

SUR PETITION FOR REHEARING

Present: SEITZ, *Chief Judge*, and VAN DUSEN, ALDISERT, GIBBONS, HUNTER, WEIS and GARTH, *Circuit Judges*.

The petition for rehearing filed by

Appellees

in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,
/s/ Aldisert
Judge

Dated: June 10, 1975

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*Judges Adams and Rosenn did not participate in the consideration of this matter.

Appendix C—Opinion of the United States District Court for the Eastern District of Pennsylvania Filed June 14, 1974

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ARMEN DE FILIPPO
and
SHELDON FLEISHMAN
t/a A & S a Partnership — Civil Action

v. — No. 70-1003

FORD MOTOR COMPANY,
a Delaware Corporation
PRESIDENTIAL FORD, INC.,
a Delaware Corporation
FORD LEASING DEVELOPMENT
COMPANY, a Delaware Corporation

Memorandum and Order

Newcomer, J. — June 14, 1974

The present case was tried to a jury on four causes of action, all arising from the same basic set of operative facts, between October 1 and November 13, 1973. On November 15, 1973, the jury returned a verdict in favor of plaintiffs on their Sherman anti-trust[1] claim and on their contract claim; the jury found for plaintiffs on their Automobile Dealer's Day in Court Act[2] claim, but also found that plaintiffs suffered no damages because of defendant's violation. Accordingly, the Court entered judgment for defendant on this claim, as well as on the contract claim,[3]

1. 15 U.S.C.A. §1 *et seq.*
2. 15 U.S.C.A. §1221-1225.
3. Although the Court described this judgment as a judgment non obstante verdicto at trial, it would be more correct to categorize the Court's action as "molding . . . the verdict as a matter of law . . . ," *Millard v. Municipal Sewer Authority*, 442 F. 2d 539, 542 (3rd Cir. 1971), since the jury was not instructed as to the Statute of Frauds and thus could not be said to have applied all the law to the facts. *See* 5A Moore's Federal Practice ¶49.02 (2d ed.) at 2206: "The procedure [special interrogatories] leaves to the trial judge the responsibility of applying appropriate legal principles to the facts found by the jury and the jury need not be instructed concerning the legal principles which the judge will apply to the facts found by them."

since the jury's answers to the special interrogatories revealed that the Statute of Frauds would bar any contractual recovery.[4] The Court entered judgment in favor of plaintiffs on the anti-trust claim, and trebled the damages awarded by the jury, which were $750,000, to $2,250,000.

Both parties have moved under Rules 50 and 59 of the Federal Rules of Civil Procedure for the grant of judgment n.o.v. or a new trial as to the various judgments entered. Defendant asserts that the plaintiffs' verdict on the anti-trust claim was based on insufficient evidence and was contrary to law, justifying the entry of judgment n.o.v. It also asserts that this Court committed a series of errors in admitting evidence before the jury or in instructing the jury, justifying a new trial. Plaintiffs attack the Court's charge and interrogatories to the jury on the anti-trust claim while supporting the jury's verdict. Plaintiffs move to amend the entry of judgment in favor of defendant on the contract claim, so as to allow recovery on this claim, and they also move for a new trial on their Dealer's Day in Court Act claim. Before addressing the arguments in support of and in opposition to these motions, it would be wise to sketch the facts from which these claims, and the jury's decisions on them, arose.

4. The Court had already directed a verdict in favor of defendant as to plaintiffs' fourth cause of action, which was based on an alleged obligation by Ford to return to plaintiffs the value of their equity in Chestnut Motors. The Court had also, upon the completion of defendant's case, directed verdicts in favor of Presidential Ford, Inc. and Ford Leasing Development Company on all four of plaintiff's causes of action.

Factual Background

Plaintiffs in this case, Armen De Filippo and Sheldon Fleishman, became Ford dealers at Chestnut Motors in West Philadelphia under an arrangement known as a "Dealer Development Dealership," in which plaintiffs put up 20% of the capital, Ford put up the rest, and plaintiffs were obligated to buy out Ford's share with the dealership's profit over a specified period of time. The record shows that plaintiffs succeeded in ending Chestnut Motor's history of losses, although because of an accountant's error, plaintiffs' profit margin was not as great as was originally thought.

On October 15, 1969, approximately eight months after plaintiffs began managing the dealership, Chestnut's main showroom, service department, parts department, and general offices were destroyed by fire.

During the negotiations between plaintiffs and Ford that followed the fire over the possibility of plaintiffs acquiring another Ford dealership, the parties focused on Presidential Motors, a "factory" (Ford owned and operated) dealership located on the fringe of Philadelphia which had shown consistent losses. The sale of Presidential to plaintiffs as private dealers was attractive to Ford because it had received complaints from nearby private Ford dealers that Presidential's subsidized losses were detracting from their sales. However, it appeared that even the dealer development program would not present attractive enough terms to induce plaintiffs to take over Presidential. Consequently, plaintiffs and Ford representatives worked out an arrangement whereby plaintiffs would postpone their investment until they had operated Presidential (and, hopefully, brought it into the black) for three months and would defer substantial parts of their rent payments to Ford until the last years of their lease.

During the negotiations these terms were embodied in the form of a buy-sell agreement, but between the conclusion of these negotiations on December 12, 1969, and the

plaintiffs' meeting with Ford Representatives on December 18, 1969, at which plaintiffs testified they expected the Presidential contract to be concluded, Ford officials changed the form of agreed terms from a buy-sell agreement into a proposed offer by plaintiffs to purchase Presidential assets. This change was ordered by Mr. Dewitt, Supervisor of Ford's Dealer Investment Services, and was effected by tearing off the first page of the buy-sell agreement and substituting a letter delineated an "offer to purchase," to which the remaining pages of the buy-sell agreement were attached as an appendix. Plaintiffs were not informed of this change.

At the December 18, 1969 meeting, Ford representatives indicated to De Filippo[4] that the deferred rent part of the negotiated package would have to await approval by Leaseco, Ford's subsidiary in charge of leasing operations. De Filippo became angry and threatened to back out on the whole deal, whereupon George Brandtz, Esquire of the law firm of Wolf, Block, Schorr, and Solis-Cohen, in whose offices the December 18th meeting was being held, suggested that the offer to purchase Presidential's assets (which De Filippo but not defendant had signed) be held in escrow pending Leaseco's approval of the deferred rent terms. This suggestion was accepted by both parties.

Plaintiff De Filippo testified at trial that he was not told of the change from a buy-sell agreement to an offer, and that he was led to believe by Ford representatives, some of whom he had relied upon in the past in his business affairs, that a complete agreement had been entered into between himself and Ford, contingent only upon Leasco's approval. He also testified that he thought Mr. Brandtz was representing both himself and Ford, since Wolf, Block, Schorr and Solis-Cohen had acted as attorney for Chestnut Motors in the past. Mr. Brandtz testified that he was acting solely for Ford, the seller, and Chestnut Motors, the buyer, of which plaintiff was only a minority stockholder. It was

4. At this time Fleishman was attending his sick wife, and De Filippo was handling affairs for both men.

undisputed, however, that Mr. Brandtz did not tell De Filippo that he was not representing him.

The time fixed at the December 18th meeting for plaintiffs' becoming managers at Presidential was January 5, 1970. Between December 18th and January 5th, Ford received complaints from several Philadelphia-area Ford dealers about the "special terms," namely, the postponed investment and deferred rent contained in the proposed arrangement between plaintiffs and Ford.[5]

On December 29, 1969, Leaseco approved plaintiffs' deferred rent terms. Plaintiffs prepared to move into Presidential on January 5, 1970, but were held off at the last minute by Ford management personnel. On January 9, 1970, Mr. Naughton, a Vice-President of Ford and General Manager of its Ford Division, flew from Detroit to Philadelphia to attend a meeting of the Philadelphia-area Ford dealers. At that meeting, which neither plaintiff attended, Naughton assured the dealers that the sale of Presidential would not be made to plaintiffs on the terms discussed above.

Subsequent to this meeting, Ford offered plaintiffs Presidential without these terms, but plaintiffs refused. Plaintiffs and Ford also negotiated over the acquisition of a third Philadelphia-area dealership, Circle Ford, but these negotiations proved fruitless. On April 10, 1970, Ford terminated plaintiffs' franchise at Chestnut Motors. There was evidence that this termination was the result of plaintiffs' refusal to sign a waiver of any legal claims they might have arising out of the aborted Presidential transaction.

The Verdicts

Plaintiffs sued Ford (and a number of its subsidiaries) under the Sherman-Act, 15 U.S.C.A. §1, alleging that Ford had conspired with its dealers to prevent plaintiffs from becoming dealers at Presidential; under the Automobile Dealer's Day in Court Act, 15 U.S.C.A. §1221-1225, alleging that in threatening to terminate unless plaintiffs signed a

5. The sale was actually to be made by Presidential Motors, Inc. to Chestnut Motors, Inc.

general waiver, defendant acted in bad faith; and upon a contract theory, alleging that an oral contract between plaintiffs and Ford could have come into existence on three separate occasions between December 18, 1969, and January 5, 1970, and that Ford's refusal to permit plaintiffs to enter into the operation of Presidential constituted a breach of such contract. Plaintiffs also claimed that a return of their equity in Chestnut Motors as of the date of the fire was due them. However, the Court, reasoning that defendant could only have been obligated to pay plaintiffs the October 15th value of their equity as part of a contract with plaintiffs for the sale of Presidential, and that any equity return would be subsumed in the damages for the breach of any such contract, directed a verdict in favor of defendant on the return of equity claim at the close of the evidence.

The jury found that Ford's failure to deal with plaintiffs on the terms outlined in the document which plaintiffs signed on December 18, 1969, was the result of a conspiracy between Ford and its Philadelphia-area dealers. The jury found that this conspiracy was not motivated by purpose of totally preventing plaintiffs from becoming Ford dealers in the Philadelphia area, but that it did constitute an unreasonable restraint of trade.

The jury found that a contract for the sale of Presidential Motors had been entered into between plaintiffs and Ford on December 18, 1969 (contingent only upon Leaseco's approval of the deferred rent terms). However, since the jury found that Ford's representatives at the December 18th meeting did not intentionally fail to disclose the fact that the document plaintiffs were signing had been changed into an offer, the Court decided that there was no reason why the statute of Frauds should not be applied, and judgment for defendant was entered on the contract claim.[6]

6. The Court had submitted the question of intentional failure to disclose to the jury on the theory that the Court should not allow the Statute of Frauds to be used in defense of a fraud. *See* Simplex Precase Industries, Inc. v. Biehl, 395 Pa. 105 (1959).

As to plaintiffs' Dealer's Day in Court Act claim, the jury found that defendant violated that Act both in threatening to terminate and in terminating the Chestnut franchise because plaintiffs would not sign a general release. However, the jury also found that the Chestnut franchise had no value as of the date it was terminated. Consequently, the Court entered judgment in favor of defendant on this claim as well.

We will deal with plaintiffs' and defendant's motions on a claim-by-claim basis.

The Anti-trust Claim

I. *Defendant's Motion for Judgment N.O.V.*

Defendant moves for the entry of judgment n.o.v. on plaintiffs' anti-trust claim, claiming that the jury's finding that the agreement between defendant and the Ford dealers was not the expression of a purpose to totally exclude plaintiffs from any and all Philadelphia-area Ford dealerships precludes that agreement from being considered a *per se* violation of the Sherman Act. As to the jury's finding that this agreement constituted an unreasonable restraint of trade, defendant argues that there was insufficient evidence presented at trial to support such a finding. Finally, defendant requests judgment n.o.v. on the grounds that the agreement found by the jury in interrogatory No. 1 was reasonable as a matter of law.

We are persuaded upon an examination of the standards for determining the reasonability of a restraint that there was insufficient evidence to warrant the jury's finding that the agreement in question constituted an unreasonable restraint of trade.

Defendant has cited several cases[7] in support of the proposition that proof of an unreasonable restraint requires

7. The three cases among those cited by defendant in which the Supreme Court actually applied the rule of reason test were *United States v. Arnold, Schwinn & Co.*, 388 U.S. 365 (1967); *Times-Picayune Publishing Co. v. United States*, 346 U.S. 594 (1952); *Chicago Board of Trade v. United States*, 246 U.S. 231 (1918).

extensive statistical evidence as to the kinds of goods or services with which the product subject to the restraint effectively competes, the geographic market in which it effectively competes, the percentage of the market affected by the alleged restraint, the size and strength of the competition, the existence or non-existence of barriers to entry and the effect of the practice thereon, the purpose behind the alleged restraint, and the effect of the restraint on price or availability of products.

Except on the matter of the purpose behind the restraint, plaintiffs herein offered little or no evidence as to any of the above elements of a rule of reason violation. No evidence was presented as to the effect of the restraint on interbrand competition (among dealers), which is required by the *United States v. Arnold, Schwinn*[8] case. No evidence was presented on the percentage of the relevant market[9] affected by the alleged restraint, the existence of barriers to entry and the effect of the practice thereon, or the effect of the restraint on the price or the availability of the affected product.

As plaintiffs' counsel declared to the Court immediately before the Court's deliverance of its charge:

> "Plaintiffs offered no evidence whatsoever during the trial that the particular conspiracy involved in this case did constitute an unreasonable restraint of trade."
>
> ". . . We did not try to prove as a matter of fact unreasonable restraint of trade because as the cases which we have cited and quoted say, to prove unreasonable restraint of trade would require just an incredible amount of evidence. It would have taken us maybe weeks or months, and this is right in the quote that I submitted to Your Honor.

8. 388 U.S. 365 (1967).

9. There was testimony from other Ford dealers and plaintiffs which would support a finding that the relevant geographic market was the "Philadelphia area" or "Greater Philadelphia area," and it was so defined in the Court's charge.

That is the reason why in per se violations such as group boycotts you do not have to prove it. So you put us in a position where you are submitting an issue of fact to the jury which we didn't try to prove. We have to lose on that because we never tried to prove it because it is not an issue of fact, sir, it is an issue of law."

At the time of these statements we believed that plaintiffs' counsel was exaggerating his predicament in order to persuade the Court to submit his case to the jury as a group boycott case. However, after examining the parties' briefs and the transcripts, the Court is persuaded that plaintiffs' counsel was candidly stating his failure (indeed lack of attempt) to prove a rule of reason violation.

If we were to agree with defendant that the jury's answer to interrogatory No. 2 defeated *per se* liability, our finding that there was insufficient evidence to support the jury's finding of unreasonableness would compel us to enter judgment in defendant's favor. However, we do not agree with defendant for the reasons discussed below.

When this Court originally submitted the special interrogatories on the anti-trust claim to the jury, we were of the opinion that Ford could not be held liable on the basis of a finding of conspiracy alone. This was because Ford's refusal to deal with plaintiffs, even if it was the result of an agreement between Ford and its Philadelphia-area dealers, did not resemble those kinds of situations which the courts had found to be "naked restraints of trade" and thus illegal without need of further inquiry into their effects on competition. *United States v. General Motors Corp.*, 384 U.S. 147 (1966); *Klor's Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207 (1959). This was because Ford refused to deal with plaintiffs on terms which we then believed to be more favorable than those offered by Ford to its other dealers, whether prospective or incumbent. Since the *per se* group boycott cases had dealt with agreements to refuse to deal with a plaintiff at all or only upon *less* favorable terms than those

offered to others, it was felt that the instant situation could not be considered to come within the *per se* group boycott category.

The Court was led to this conclusion by the reasoning as well as the facts of the group boycott cases. The pernicious effects which the Supreme Court inferred from the inherent nature of a group boycott were best set out in the Court's decision in *Klor's:*

> "This [group boycott] takes from Klor's its freedom to buy appliances in an open competitive market and drives it out of business as a dealer in the defendant's products. It deprives the manufacturers and distributors of their freedom to sell to Klor's at the same prices and conditions made available to Broadway-Hale and in some instances forbids them from selling to it on any terms whatsoever." 359 U.S. at 213.

The present agreement did not appear to take from plaintiffs their access to Ford dealerships in an "open competitive market;" it merely prevented plaintiffs from acquiring a dealership on special terms. Nor did the present agreement seem to deprive Ford of its freedom to sell to plaintiffs "at the same prices and conditions made available to [its other dealers]." 359 U.S. at 213.

An additional factor that led to the conclusion that the present situation did not resemble the situations condemned by the group boycott *per se* cases was plaintiffs' exclusion from only one source of supply of defendant's product. It was the Court's understanding that the group boycott cases had involved either exclusion from a market or denial of access to a line of merchandise. In *Klor's*, cited *supra*, plaintiffs were denied access (or allowed access on discriminatory terms only) to the appliances sold by the manufacturer-members of the conspiracy; in *General Motors*, cited *supra*, plaintiffs were prevented from selling to discounters entirely (and the discounters were denied access to General Motors cars); in *Fashion Originators'*

Guild v. Federal Trade Commission, 312 U.S. 457 (1941), certain retailers were totally denied access to the products of Guild members. The agreement between Ford and its dealers not to deal with plaintiffs on the negotiated terms denied plaintiffs access to only a portion of defendant's product.[10] Absent a finding that the agreement was motivated by a desire to deny plaintiffs access to defendant's entire product, rather than merely one outlet, it was felt that plaintiffs had not been the victims of the kind of restraint condemned without further inquiry by the group boycott cases.

Throughout trial, defendant maintained that a finding of agreement not to deal with plaintiffs did not constitute a *per se* violation unless the jury also found that this agreement had been motivated by a purpose to exclude plaintiffs from becoming Philadelphia-area Ford dealers on any terms. Whether plaintiffs had been offered more or less favorable terms than those offered to other dealers, or whether plaintiffs had been excluded from access to a fraction or all of defendant's product, is irrelevant to this argument. Defendant contends that even an agreement to deal with plaintiffs on only discriminatory terms would not qualify as a *per se* violation unless a purpose to exclude plaintiffs from the market was also found. Defendant bases this argument on the case of *Joseph E. Seagram & Sons, Inc. v. Hawaiian Oke and Liquors, Ltd.*, 416 F.2d 71 (9th Cir. 1959), *cert. denied* 396 U.S. 1062 (1970), which in dictum declared that in all the Supreme Court group boycott cases ". . . There was a purpose either to exclude a person or group from the market, or to accomplish some other anti-competitive objective, or both." 416 F.2d at 76.

This Court believes that defendant too narrowly construes *Seagram* when it states that that case requires a finding of purpose to exclude rather than an "anti-competitive purpose" in general. Nevertheless, assuming arguendo

10. This is true whether the relevant product is seen as wholesale Ford vehicles or Philadelphia-area Ford dealerships.

that defendant's construction is correct, the Court rejected it before trial and continues to reject it now.

It is this Court's belief that an "anti-competitive purpose" as stated by the *Seagram* case can generally be presumed in a situation where there is a concerted refusal to deal with a party on any terms or only on unfavorable terms, and that no specific finding of anti-competitive purpose, let alone a purpose to entirely exclude from the market, need be made. While there are special situations in which this presumption cannot be made, such as the situation faced in *Seagram* or by the Third Circuit in *Ark Dental Supply Co. v. Cavitron Corp.*, 461 F.2d 1093 (1972), we do not feel that the present situation is one of them.[11] Plaintiffs were not exclusive distributors facing replacement by another exclusive distributor. The Court is aware that this Circuit has commented favorably on the reasoning of the *Seagram* case, *Ark Dental*, cited *supra*, but we believe that this was done only insofar as it applied to the exclusive distributor situation. Should we be wrong, the jury's answer to the second interrogatory would allow the appellate court to correct our error without the need of a new trial.

This Court did submit to the jury the question of whether the agreement, if any, was motivated by a purpose to exclude plaintiffs from the market (interrogatory No. 2). But this interrogatory was submitted not on the theory that it was prerequisite to a finding of *per se* liability but that it

11. In both *Seagram* and *Ark Dental*, the Court was faced with an agreement between manufacturers to replace one joint exclusive distributor with another. The losing distributor sued, alleging a group boycott between both manufacturers and the triumphant distributor. The Third Circuit stated:

> "It is indisputable that a single manufacturer or seller can ordinarily stop doing business with A and transfer his business to B and that such a transfer is valid even though B may have solicited the transfer and even though the seller and B may have agreed prior to the seller's termination of A." (461 F. 2d at 1094)

was an alternative basis for such a finding. A concerted refusal to deal, whether or not it fits the outlines of a group boycott as defined by the group boycott cases (see discussion in pp. 9-10, supra), would undeniably be a *per se* restraint were it found to be the expression of a purpose to totally exclude a competitor[12] from the market.

Thus, the jury's answer to the second interrogatory does not preclude a finding that the agreement between Ford and its Philadelphia-area dealers constituted a *per se* violation of the Sherman Act. Upon a re-examination of the record and with the benefit of able and extensive briefing and oral argument of counsel for both parties, the Court has concluded that the facts of this case bring it within the group boycott *per se* liability category.

As noted above, it was originally thought that the terms offered plaintiffs for the purchase and operation of Presidential were not offered to other neighboring Ford dealers. However, there was testimony that these terms, or substantially equal terms, were offered to the other dealers. The record reveals that on December 30, 1969, a meeting was held between Ford's regional representatives and certain Philadelphia-area Ford dealers for the purpose of discussing the terms of the proposed sale of Presidential to plaintiffs. A number of these dealers left this meeting with suspicions that plaintiffs were receiving preferential treatment.

One of the dealers who had attended the December 30 meeting, Kerry Pacifico, subsequently contacted Ford's Dealer Policy Board, the bureau officially responsible for dealer-corporation relations, to protest the terms of the proposed sale. There was evidence that this dealer threatened to bring suit, presumably under the Robinson-Patman Act,[13] because of Ford's allegedly preferential treatment

12. Although plaintiffs competed with the other dealers and not Ford, the latter can be held solely liable for the bad purposes of its co-conspirators. E. A. McQuade Tours, Inc. v. Consolidated Air Tour Manual Committee, 467 F. 2d 178 (5th Cir. 1972), *cert. denied*, 409 U.S. 1109 (1973).

13. 15 U.S.C. §13 (1936).

of plaintiffs. On January 6, 1970, the members of the Dealer Policy Board travelled from Michigan to Philadelphia to meet with this dealer. Unable to mollify him, they instructed Ford's management for the Philadelphia region that terms similar to those being offered plaintiffs would have to be offered to the other dealers in the Philadelphia-area in order to protect Ford from a Robinson-Patman suit. These instructions were based upon advice given to the Policy Board members by Ford's legal counsel, and were apparently ratified by the officer in charge of the Ford Division of the Ford Motor Company, John Naughton. (N.T. p. 3984, 3986).

On January 7, 1970, certain Philadelphia Ford management personnel met with Mr. Pacifico. At this meeting they informed this dealer that they would extend him rent terms identical to those being proposed to plaintiffs even though it meant that Ford would have to buy Pacifico's land and become his landlord in order to put these terms into effect. These Ford officials indicated that such an arrangement would also be offered to all the neighboring Ford dealers. The dealer, expressing a clear lack of enthusiasm for taking Ford on as a landlord, rejected this offer, and remained constant in his criticism of the "special terms" being offered plaintiffs. The following testimony was elicited from the Ford representative who conducted this meeting:

> "Q. O.K. Well, this problem that you considered the most important one, the one about the deferred rent that if you offered it to Armen and Shelley [DeFilippo and Fleishman] you'd have to offer it to everybody?
>
> A. Yes.
>
> Q. Well, you kind of already had gone partway on that in your January 7th meeting with Mr. Pacifico. You'd already told him that if the deal went through with Armen and Shelley he could have the same deal and you'd buy his place?
>
> A. Yes.

Q. So why was that still a problem? In fact, that decision had been made to tell the dealers, hadn't it, because you told one of them?

A. Well, that was the next day after the Policy Board told me and Mr. Barclay and Mr. Curran, I believe—Mr. Barclay confirmed that I had to tell them.

Q. All right. Then, in fact, by January 9th, he already had told you, so you kind of crossed the Rubicon?

A. I told one dealer. I made one contract. I had 29 more to make.

Q. Right, but that one dealer was Kerry Pacifico who was pretty much the acknowledged leader, and I think you realized, didn't you, if you told Kerry he was going to tell all the other dealers?

A. Yes." (N.T. pp. 3991-3992).

On January 9, 1970, during a meeting at which most of the Philadelphia-area dealers were present, John Naughton announced that Ford would not go through with the proposed deal with plaintiffs. But even after this announcement was made, Ford personnel extended terms similar to those offered plaintiffs and Pacifico to other Ford dealers (N.T. pp. 2604-2605).

It is true that one of the "concessions" offered plaintiffs was permission to defer their investment in Presidential until they had operated it for three months, and that this feature was never offered to the other dealers. But it does not appear that such a proposal could have been offered to dealers who had already made their investments. In offering to buy the dealers' land and rent it back to them on a deferred basis, Ford had gone a long way towards equalizing its treatment of plaintiffs and its treatment of the other dealers. And while it is also true that these terms may have been offered to the other dealers subject to Ford management's ultimate approval of the terms offered to plaintiffs, this qualification becomes irrelevant when it is remembered that the terms offered plaintiffs were also subject to ultimate approval by Ford's management. An agreement to refuse to deal with a party on equal terms with other customers is not less than a *per se* violation merely because those terms are proposed rather than the subject of a binding contract.

As for the assumption that a plaintiff must either be excluded from a market or completely denied access to defendant's product by an agreement before that agreement rises to the level of a *per se* violation, plaintiffs' counsel have advanced several decisions which support the conclusion that less than total exclusion or denial of access is required. *Ricci v. Chicago Mercantile Exchange*, 447 F.2d 713 (7th Cir.), *aff'd.* 409 U.S. 289 (1973); *Ford Motor Co. v. Webster's Auto Sales*, 361 F.2d 874 (1st Cir. 1966).

In *Ricci*, the Seventh Circuit held that a commodities broker had been the victim of a group boycott when the president and certain members of the Chicago Mercantile Exchange agreed to remove plaintiff's Exchange membership in violation of Exchange by-laws. The Court ruled that the facts alleged in plaintiff's complaint made out a *per se* violation even though plaintiff obtained another membership three weeks later. However, the Circuit Court stayed the anti-trust action pending administrative proceedings under the primary jurisdiction doctrine. The Supreme Court affirmed the lower court's finding that primary jurisdiction lay with the administrative agency.

In *Ford Motor Co. v. Webster's Auto Sales*, cited *supra*, plaintiff was a used car dealer who had succeeded in acquiring "factory Fords" (vehicles made available to Ford employees for their own use) from Ford dealers on a wholesale basis. A Ford dealer complained about this practice to Ford and Ford attempted to stop its dealers from reselling factory Fords to plaintiff (at least at wholesale). The District Court found a *per se* group boycott and the Circuit affirmed, even though plaintiff had only been denied access to a portion of defendant's product.

Based on these decisions, the Court believes that a *per se* violation of the Sherman Act can be made out by an

agreement which denies access to only one source of supply of defendant's product.

Defendant asserts in support of its motion for judgment n.o.v. that the agreement to refuse to deal with the plaintiffs at Presidential on the terms set forth in plaintiffs' offer was reasonable as a matter of law. Defendant cites a number of instances in which courts have held that an agreement between a manufacturer and a distributor to shift the manufacturer's exclusive distributorship to that dealer from another dealer was not an unreasonable restraint of trade. The present case does not involve an exclusive dealership,[14] however, and none of the cases referred to by defendant involve, as does the present case, a situation in which a group of plaintiffs' competitors combine with a manufacturer to interfere with plaintiffs' attempt to secure a distributorship.

II. *Defendant's Motion for a New Trial*

Defendant has moved for a new trial on the basis of several alleged errors by the Court. We will deal with these seriatim.

a. Defendant's first three asserted bases for a new trial.

Defendant's claims that it was prejudiced because plaintiffs' pretrial memorandum did not mention a rule of reason theory of liability, that the Court's charge on reasonableness was erroneous and that the Court's third interrogatory was erroneous, are no longer relevant since the Court has ruled that no rule of reason violation has been proven. Therefore, we will proceed to discuss defendant's new trial motions that concern damage evidence.

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14. The replacement of one exclusive distributor by another necessarily involves the total exclusion of a competitor from the affected product's market.

b. Errors concerning Admissions of Plaintiffs' Expert's Testimony concerning the value or plaintiffs' interest in Presidential.

i. No basis in record for assumption that Presidential would show $84,000 profit in first year (after its sale).

Defendant attacks the figure of $84,000, which plaintiffs' two experts relied upon in computing damages, as having no basis in the record establishing it as Presidential's first year's profits under new management. The $84,000 figure was taken from a profit forecast prepared by Ford to be shown to potential buyers of Presidential. (The forecast was prepared on August 18, 1970, almost nine months after the agreement not to deal with plaintiffs). Defendant points out that this document predicts a first-year profit of $19,555 and a "going year" profit of $84,447, and that it was based on factors which did not conform to the arrangement plaintiffs had offered.

In spite of defendant's arguments, the Court feels now as it did at trial that this forecast provided a reasonable basis for plaintiffs' use of the $84,000 figure. Defendant had the opportunity to, and did, argue to the jury the factors underlying the profit forecast which were not reflected in plaintiffs' proposed arrangement for operating Presidential. Defendant also presented testimony by a Ford officer, Mr. Curran, which, based on an adjustment of the forecast to fit plaintiffs' theoretical operating situation, revealed a much lower profit prediction.

ii. Plaintiffs' experts' projections.

Defendant objects to the admission of the testimony of plaintiffs' expert Professor Adams, who projected an increase in Presidential's profits of 7% over a twenty-year period, based on Adams' predictions that national income would increase 7% (6% in the Philadelphia area) and national consumer purchases of automobiles and parts would increase 7% over the same twenty-year period.

namely, 1970-1990. Defendant attacks these projections on two levels, the first being that Adam's projections of the 6% and 7% increases lacked the foundation required by the Third Circuit in *Hoffman v. Sterling Drug, Inc.*, 485 F.2d 132 (1973), and the second being that, assuming these increases to be valid, there was no basis in the record for assuming, as Professor Adams did, that any increase in Presidential's profits would exactly mirror either of these increases.

Defendant's first challenge—that Adams' projections for future national income and automobile purchases was inadmissible speculation—construes too narrowly the *Hoffman* test for the admissibility of evidence concerning future trends. In *Hoffman*, the Third Circuit ordered a new trial on the amount of compensatory damages because plaintiff was allowed to introduce a loss-of-wages projection calculated on the assumption that wages would continue to increase at the same rate that they had during the proceeding five years. The Court, noting that the case was ". . . marked by the total absence of any evidence of probable future salary or economic trends", treated the assumption that the rate of inflation would remain constant as "speculation." In the present case, however, Professor Adams offered statistics concerning the past rate of growth of factors which would probably influence the future rate of growth of car purchases, as well as his opinion as to why these factors would continue into the future. These statistics provide the foundation for allowing Professor Adams to testify as to the 6% and 7% figures. The jury heard defendant cross-examine Adams on the probability that these projections would actually be realized including inquiries as to the impact of the fuel crisis and anti-pollution regulations on future Ford automobile purchases. It was for the jury, and not the Court, to decide whether it was probable that these projected increases were accurate; the *Hoffman* case only requires the Court to find that there is a reasonable basis for thinking that such increases are probable,

and this Court was satisfied that Adams' testimony established such a reasonable basis.

As to defendant's challenge to Adams' link between these projected increases and the rate of increase of Presidential's profits, the Court was also satisfied that a reasonable basis was established by Adams' testimony for assuming a one-to-one relationship. Defendant was given ample opportunity to cross-examine Adams on the probability the relationship of national income and sales increases to the profit margins of Philadelphia-area dealers and, in particular, of Presidential Motors.

d. Remaining Grounds.

The Court believes that it can summarily deal with the other grounds which defendant offers in support of its motion for a new trial. There was a reasonable basis in the record for permitting plaintiffs' experts to make their projections over a twenty-year period, and in permitting Professor Mendelson to include plaintiffs' bonus[15] in his valuation of plaintiffs' interest in Presidential Motors. Defendant was able to cross-examine plaintiffs' experts and other witnesses, as well as offering its own testimony, on the accuracy of these two assumptions.

Defendant charges that Professor Mendelson's evaluation of plaintiffs' interest in Presidential should have been excluded because he employed an improper discounting procedure. Professor Mendelson used a 6% simple interest figure in discounting the profits that Presidential Motors might have made to their present worth in valuing the value of plaintiffs' interest in 1970. Defendant raised this objection during trial at which time the Court ruled that plaintiffs would be permitted to use the 6% simple in-

15. Defendant attacks Mendelson's inclusion of bonus in the value plaintiffs' interest on the grounds that it represented compensation rather than profits. But the definition of bonus as profits was taken from the Dealer Development contract prepared by defendant for plaintiffs' signature.

terest figure, but that defendants could cross-examine or offer counter-projections on a percentage figure which they felt more closely approximated the risk factor for the automobile industry. This Court's decision was based upon authority cited to it by defendant which stated that

> ". . . The discount rate applied should vary according to the amount of evidence *the trier of fact* has in the likelihood that the earnings level he has predicted actually would have been maintained. . . ." Note, Private Treble Damage Antitrust Suits: Measure of Damages for Destruction of All or Part of a Business, 80 Harvard L. Rev. 1566, 1577 (1967).

While permitting plaintiffs to rely on the percentage figure, the Court did not remove the ultimate decision as to the reasonableness of the discount figure from the jury, and thus did not commit error requiring a new trial.

The Court also rejects defendant's assertions that its interrogatories and charge precluded the jury from considering defendant's "market price" approach to the valuation of plaintiffs' interest in Presidential Motors. (Defendant argued—and the Court charged the jury—that they could value plaintiffs' interest in Presidential in 1970 by the amount plaintiffs had offered to pay for, and the amount defendant had agreed to sell, Presidential, that is $84,000). Special Interrogatory No. 6 asked the jurors:

> "What percentage figure did you find appropriate in reducing to present value plaintiffs' share of projected future profits in determining the value of plaintiffs' share of Presidential Motors?"

This question was presented merely to identify the discount rate, if any, the jury used in case the Appellate Court disagreed with our ruling that a 6% simple discount rate was not required. Taken into consideration the arguments of counsel and this Court's charge, we do not feel that the submission of this interrogatory prejudiced the jury's consid-

eration of both methods of valuing plaintiffs' interest. And, along these lines, the Court is not persuaded that its "fleeting" charge on the market value ($84,000) method of valuing plaintiffs' interest, given as it was in response to defendant's objection after the main charge, had less effect on the jury than the main charge. It could be said with equal force that what the jury heard last—and what was set apart from the rest—had a greater impact on them than material contained in the main charge.

The assertion that the jury's single damage verdict of $750,000 was grossly excessive concentrates on the market value approach to valuing plaintiffs' interest to the exclusion of the discounted profits approach of valuing that interest. The Court finds that the award was well within reasonable bounds.

The Court's refusal to grant defendant's motion for a bifurcated trial as to liability and damages at the eve of trial was not error requiring a new trial, because such a bifurcation would have unduly hampered the presentation of plaintiffs' liability case.

Any and all arguments made by defendant in support of their motion for a new trial which are not discussed are hereby rejected.

e. Defendant's Motion for a New Trial under Rule 60(b)(2).

Subsequent to the period allowed for the filing of motions for judgment n.o.v. and new trial, defendant moved for a new trial on the basis of newly discovered evidence. F.R.C.P. 60(b)(2). Defendant claims that in examining the time sheets of plaintiffs' counsel which this Court declared it could do in connection with a hearing on counsel fees, it discovered evidence that contradicts the testimony of plaintiff De Filippo at trial. The evidence which defendant offers is time sheets which show that De Filippo[16] consulted

16. The time sheets show that plaintiff Fleishman met with this same counsel two times prior to March 1, 1970.

attorney Jacob Siegal, a partner in plaintiffs' counsel's firm, on three separate occasions prior to March 1, 1970. At trial De Filippo testified that he did not "get an attorney" until after March 1, 1970.

Defendant contends that this new evidence entitles it to a new trial, presumably on the grounds that the new evidence might lead the jury to view the negotiations concerning a new dealership for plaintiffs that followed the ill-fated December 1969 negotiations over Presidential in a light more favorable to defendant. However, in order to justify a new trial under Rule 60(b)(2), the evidence in question must not have been previously discoverable by the exercise of reasonable diligence, must not merely discredit, contradict, or impeach a witness, and must be such as would probably change the outcome of the trial. *Giordano v. McCartney*, 385 F.2d 154 (1967); *Baird v. Aluminum Seal Co.*, 149 F. Supp. 874, *aff'd.* 250 F.2d 595 (3rd Cir. 1957).

We believe that defendant was not remiss in not finding this evidence before now. However, we feel that this evidence does not meet the other requirements established by the cases in this Circuit interpreting Rule 60(b)(2). The new evidence seems only to impeach the testimony of a witness, in this case the testimony of plaintiff De Filippo. And it seems unlikely that the new evidence would change the outcome of the case, since it relates to events which occurred after the dates on which the jury found defendant had committed the violations for which it was held liable.

For these reasons, defendant's motion for a new trial under Rule 60(b)(2) will be denied.

III. *Plaintiff's Motion for a New Trial*

Plaintiffs have moved for a new trial limited to the issue of damages on their anti-trust claim in the event and only in the event, that defendant is granted a new trial on this cause of action. Since defendant's motions for a new trial on this cause of action were denied, plaintiffs' contingent motion for a new trial will also be denied.

IV. *Plaintiffs' Motion for Reasonable Attorney Fees*

We come now to the matter of determining the amount of reasonable attorney fees to be paid by defendant to the plaintiffs as is authorized by Section 4 of the Clayton Act, 15 U.S.C. §4. Plaintiffs have requested that the Court award plaintiffs $500,000 in attorney fees.

At the threshold of any such determination is the question of what standard must be applied in arriving at an amount which represents reasonable attorney fees. Recent decisions of this and other circuits appear to have altered the traditional approach to fixing attorney fees. Lindy Bros. Builders, Inc. v. American Radiator and Standard Sanitary Corp., 487 F.2d 161 (3rd Cir. 1973); Merola v. Atlantic Richfield Co., 1974 CCH Trade Cases ¶74, 957 (3rd Cir. 1974); Detroit v. Grinnell Corp., 1974 CCH Trade Cases ¶74, 986 (2d Cir. 1974). Under the traditional standard, the number of hours spent by the successful attorney and his normal hourly billing rate were factors whose importance did not exceed such other factors as the complexity of the case or the ability of plaintiff's counsel. Noerr Motor Freight v. Eastern Railroad Pres. Conf., 166 F. Supp. 163 (E.D. Pa. 1958). Several courts have held that the total time spent and average hourly rate factors should receive less weight than other factors such as those mentioned above. TWA v. Hughes, 312 F. Supp. 478, 483 (S.D. N.Y. 1970) *aff'd.* 449 F.2d 51, *reversed on other grounds*, 409 U.S. 363 (1973); Hanover Shoe, Inc. v. United Shoe Machinery Corp., 245 F. Supp. 258, 303 (M.D. Pa. 1965). However, in the *Lindy* case, cited *supra*, the Court of Appeals for the Third Circuit declared that the starting point for fixing reasonable attorney fees was the hours spent and the petitioning attorney's normal billing rate, and that the burden of showing both of these amounts was on the attorney(s) seeking the award. It is true that *Lindy* involved an award to be paid to plaintiff's attorneys from a fund received by plaintiff in settlement of an anti-trust case as compensation for services rendered a particular class of plaintiffs, whereas in the

present case attorney fees are not being sought on a quantum meruit basis for service rendered to the plaintiff class. But we still fee that *Lindy* sets down the only rational basis for arriving at reasonable attorney fees in the Section 4 situation. Even if *Lindy* had never been written, we would have followed a process similar to the one it outlines.

Lindy does not, of course, state that only total hours, and the amount plaintiff 's attorney normally charges for those hours, should be considered by a court in awarding attorney fees. The award is to be adjusted (in either direction) depending on the degree of contingency in plaintiff 's success and the quality of their attorneys' work. Among the factors to be considered in judging the latter are "the complexity and novelty of the issues presented, the quality of the work the judge has been able to observe, and the amount of the recovery obtained." 487 F.2d at 168.

Plaintiffs' counsel have submitted the total number of hours spent on this case by all members of their firm who worked on it. They have broken this total down into the number of hours devoted by each attorney, and have included the normal hourly rate charged by each of these attorneys. The total number of hours claimed by plaintiffs' attorneys is 3,270.9[17]; if these hours were to be compensated at these attorneys' normal billing rate, the plaintiffs would be owed $252,385.00.

Defendant disputes plaintiffs' figures as to the number of hours spent on this case. The main thrust of their attack centers upon the time spent immediately before and at trial by Messrs. Rabin and Baruch. Two Thousand Two (2,002) hours, or 59% of the total number of hours plaintiffs' counsel charged to the case were accounted for by five time slips which were prepared by counsel after the trial on the basis of their recollection. These time slips shows that lead counsel for plaintiffs estimated that they worked 11 hours for 6

17. Plaintiffs originally claimed to have put in 3,413.6 hours, but reduced this figure by 142.7 hours allegedly spent developing claims other than the anti-trust claim.

days a week, or 66 hours a week during the pretrial period (7 weeks) and 15 hours a day for 7 days a week, or 105 hours a week during the trial period (approx. 6 weeks). Defendant contends that counsels' maintaining such a schedule over the stated period of time is unlikely, and advances in support of its contention the register book of the building in which the law firm of Messrs. Rabin and Baruch is located. Entries in this register do not substantiate plaintiffs' attorneys' claims; they show that the attorneys were not checked in at times they have claimed they were working. Defendant also asserts that the fact that time slips for the pretrial and trial periods were not made contemporaneously renders them of little value.

While the register book seems to undercut the picture of a seven day a week, fifteen hour a day routine, we do not feel that we could begin subtracting hours from the total without litigating the register's reliability. This would be collateral to the issue before us, which is to determine a basis upon which reasonable attorney fees can be computed. We will accept plaintiffs' representations rather than involve the Court in the minutiae of plaintiffs' attorneys' method of operation. Likewise, while contemporaneous, detailed time sheets would be the best evidence, we will accept plaintiffs' attorneys' time slips for the pretrial and trial periods. The *Lindy* case was decided after most of these hours had been put in, and it would be unfair to punish these attorneys for not making the kind of records they had no reason to know they would need. Perhaps it needs no mention that future plaintiffs' counsel would be wise to keep contemporaneous time records.

Defendant's second and critical attack on plaintiffs' hours figure is grounded on plaintiffs' failure to separate the hours spent on their anti-trust claim from those spent on their contract and Dealer's Day in Court Act claims. Section 4 of the Clayton Act allows recovery of attorney fees for successful prosecution of the anti-trust claim, but there is no concept of "pendancy" which would gain plaintiffs an award for these other claims (neither of which was

successful). Plaintiffs have made a small deduction for legal research spent on these two claims[18] but claim that all hours spent developing these claims at or before trial are properly chargeable to the anti-trust claim. Defendant disputes this to the point of preparing a page-by-page analysis of each document involved in the case, including the transcript, in an attempt to ascertain the proportion of the hours claimed attributable to the anti-trust claim.

Plaintiffs' argument for attributing nearly all the hours they worked to the anti-trust claim is that this claim would have been unintelligible to the jury unless all the background and consequential facts, including those that gave rise to the contract and Dealer's Day in Court claims, were presented. Defendant's page by page analysis attributes only 52% of plaintiffs' case to proving the anti-trust claim. (This figure would be approximately 60% if hours related to damages from the loss of Chestnut Motors were allowed). Thus the relevancy of almost half of the hours claimed by plaintiffs' attorneys is in dispu e.

We are unwilling to either accept defendant's characterizations at face value, because of the questions of judgment and perspective involved, or to review every page involved in this case to make our own distinctions. Therefore, we will make our own distinctions based on a witness by witness rather than a page by page approach. Based on our perception of the witnesses' testimony at trial, we believe the testimony of Messrs. Rosenfeld, Pryor, Oswald, Brantz, and Clouser was less closely related to the anti-trust claim than it was to plaintiffs' other two claims. While it could be expected that these witnesses would have been deposed and called at trial in connection with the anti-trust claim, we feel justified in restricting plaintiffs' attorney fees to one-half of the time and energy spent deposing these witnesses or examining them at trial. While this method may be less exact than that proffered by defendant, we believe that it is as just in the long run as

18. See Footnote 17, *supra*.

well as constituting a simpler and more expedient approach to the problem of fixing reasonable attorney fees.

According to the pages of testimony and depositions allocated to these witnesses by the defendant, the exclusions made represent 476 pages out of a total of 6,945, or approximately one-fourteenth of the total.[19] An equivalent reduction in the amount normally charged by plaintiffs for their time would be $18,028. $\left(\frac{\$252,385}{14}\right)$[20] This would leave the total hours charged at plaintiffs' attorneys' normal billing rate at $234,357.

This analysis includes in plaintiffs' compensable hours the time spent on developing damages for plaintiffs' loss of Chestnut Motors. Defendant asserts that such time should not be included because the Court did not ultimately allow proof of such losses as part of the anti-trust claim. It is our opinion that, where evidence of these losses to show comparative losses at Presidential was not excluded until the middle of trial, and where evidence of such losses as the proximate result of the claimed anti-trust violation was not disallowed until the end of trial, any exclusion of the hours spent developing this evidence would be unfair. There was a reasonable basis for urging the consideration of damages from the loss of Chestnut as part of plaintiffs' anti-trust claim. TWA v. Hughes, 312 F. Supp. 478, 483, aff'd. 449 F. 2d 51; *reversed on other grounds*, 409 U.S. 363 (1973).

19. The breakdown of pages by witness is as follows:

Trial Testimony		*Depositions*	
Rosenfeld	42	Pryor	77
Pryor	247	Oswald	37
Oswald	76	Brantz	23
Brantz	57	Clouser	170
Clouser	222	Total	307
Total	644		

20. Of course, this arithmetic assumes that the billing rate spent on developing these witnesses' testimony was the average for all the work done.

To the amount reached above must be added an amount representative of the quality of plaintiffs' attorneys' work and the contingent nature of their success. This case was a long and complicated one, for which no groundwork was laid by a prior government indictment. Plaintiffs' counsel, faced with able and articulate counsel on the other side, succeeded in convincing the jury of the merit of their claim. We find that the sum of $150,000 will adequately compensate plaintiffs for the quality of their attorneys' work and the contingent nature of their success. The total award of attorney fees is, therefore, $384,357.00.

Dealer's Day in Court Act Claim

Plaintiffs have moved for a new trial, limited to the issue of damages, of their Dealer's Day in Court Act claim if and only if this Court grants defendant's motion for judgment n.o.v. on their anti-trust claim. Since the Court has denied defendant's motion of judgment n.o.v. on the anti-trust claim, plaintiffs' motion for a new trial will be denied. Similarly, defendant has moved for a new trial as to liability on the Dealer's Day in Court Act claim should plaintiffs be awarded a new trial as to damages. Since plaintiffs' new trial motion has been denied, defendant's will be also.

Breach of Contract Claim

I. *Plaintiffs' Motion for an Amended Judgment*

Plaintiffs request under Federal Rule of Civil Procedure 59(e) that we amend our entry of judgment[21] in favor of defendant on the breach of contract claim and instead enter judgment in favor of plaintiffs on this claim

21. As stated before, this Court's entry of judgment in favor of defendant more closely resembled the "moulding" of the verdict than it did judgment n.o.v. See FN. 3, *supra*.

in the sum of $1,250,000, which the jury found to be the extent of plaintiffs' damages from the breach.

In their arguments in support of this motion, plaintiffs neglect to mention the Statute of Frauds which the Court was enforcing in entering judgment in favor of defendant. Although in its answer to interrogatory No. 16 the jury found that Ford had entered into a contract with plaintiffs for the sale of Presidential, this contract was unenforceable because its subject matter included goods worth more than $500 and a lease in excess of three years and was unsigned by Ford. 12A P.S. 2-105 (1970) (U.C.C. provision relating to goods); 68 P.S. 250.201-250-203 (1965) (provision relating to leases).

However, this Court was inclined to follow the reasoning of the Pennsylvania courts that the Statute of Frauds should not be permitted to immunize fraudulent conduct.[22] Accordingly, the Court submitted to the jury the questions of whether defendant's agents had a duty under the circumstances to disclose certain facts to plaintiffs and whether they intentionally failed to perform this duty (interrogatories Nos. 14 and 15). The jury found that defendant's agents had not intentionally misled plaintiffs. Absent a finding of wilful misconduct, we could see no reason why the Statute of Frauds should not be enforced here.

Plaintiffs now argue that, although they knew it was an offer to purchase and not a contract they were signing on December 18, 1969, defendant's agents induced plaintiffs into believing that Leasco's approval would constitute Ford's acceptance and that no further formal procedures were necessary to make the contract binding. However, no mention was made at trial, nor in any of plaintiffs' trial memoranda concerning the application of the Statute of Frauds, of any misrepresentations, intentional or otherwise, concerning the manner in which Ford would accept plaintiffs' offer to purchase Presidential. The jury found a

22. See footnote 6, *supra*.

contract was entered into on December 18, 1969, conditioned only upon acceptance by Leaseco of the deferred rent plan, and plaintiffs cannot argue that the jury's answers support a theory of fraud which presumes that only an offer was made at that time.

II. *Defendant's Motion for a New Trial*

Defendant has moved for a new trial on the breach of contract claim should we decide to vacate judgment in its favor. Since we have not done so, defendant's new trial motion will be denied.

ORDER

AND NOW, to wit, this 14th day of June, 1974, the following dispositions are made of the motions filed by the parties in the above captioned matter:

1. Defendant's Motion for Judgment N.O.V. on Plaintiffs' anti-trust cause of action is DENIED;
2. Defendant's Motion for a New Trial on Plaintiffs' anti-trust cause of action is DENIED;
3. Defendant's Motion for Relief from Judgment under Rule 60(b)(2) is DENIED;
4. Plaintiffs' Motion to Amend Judgment with respect to their contract cause of action is DENIED;
5. Plaintiffs' Motion for a New Trial limited to the issue of damages on their Automobile Dealer's Day in Court Act cause of action is DENIED;
6. Plaintiffs' Motion for Allowance of Counsel Fees is GRANTED, and Plaintiffs are hereby awarded counsel fees in the amount of Three Hundred Eighty Four Thousand Three Hundred Fifty Seven ($384,-357.00) Dollars. AND IT IS SO ORDERED.

/s/
Clarence C. Newcomer, J.

Appendix D—Seventh Amendment to the Constitution of the United States

"In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law."

Appendix E—Section 1 of the Sherman Act, 15 U.S.C. 1

"Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal: *Provided*, That nothing contained in sections 1 to 7 of this title shall render illegal, contracts or agreements prescribing minimum prices for the resale of a commodity which bears, or the label or container of which bears, the trademark, brand, or name of the producer or distributor of such commodity and which is in free and open competition with commodities of the same general class produced or distributed by others, when contracts or agreements of that description are lawful as applied to intrastate transactions, under any statute, law, or public policy now or hereafter in effect in any State, Territory, or the District of Columbia in which such resale is to be made, or to which the commodity is to be transported for such resale, and the making of such contracts or agreements shall not be an unfair method of competition under section 45 of this title: *Provided further*, That the preceding proviso shall not make lawful any contract or agreement, providing for the establishment or maintenance of minimum resale prices on any commodity herein involved, between manufacturers, or between producers, or between wholesalers, or between brokers, or between factors, or between retailers, or between persons, firms, or corporations in competition with each other. Every person who shall make any contract or engage in any combination or conspiracy declared by sections 1 to 7 of this title to be illegal shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court."

Supreme Court, U. S.
FILED
OCT 14 1975
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1975

No. 75-229

ARMEN DEFILIPPO AND SHELDON FLEISHMAN,
t/a A & S, A PARTNERSHIP,
Petitioners

v.

FORD MOTOR COMPANY
Respondent

PETITIONERS' SUPPLEMENTAL BRIEF UNDER RULE 24(5) AND APPENDIX

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Petitioners' Supplemental Brief under Rule 24(5)

Petitioners file this supplemental Brief, under Rule 24(5), to call the Court's attention to an unreported decision of the Ninth Circuit Court of Appeals, filed September 18, 1975, which was unavailable to Petitioners' counsel at the time they filed their prior Petition for Certiorari and Reply Brief. That decision is *Helix Milling Company v. Terminal Flour Mills Co. and General Foods Corporation* (9th Cir. No. 73-1831), a copy of which is attached hereto as an Appendix.

The threshold issue raised in our Petition for Certiorari is whether the Third Circuit erred in holding that a specific anticompetitive purpose is a requisite of a group boycott conspiracy under Section 1 of the Sherman Act. We argued that such a holding was not only in contravention of the holdings of this Court, but was in conflict with the holding of the Ninth Circuit Court of Appeals in *United States v. Hilton Hotels Corp.*, 467 F.2d 1000 (9th Cir. 1972), *cert. den.*, 409 U.S. 1125 (1973). We respectfully submit that the holding of the *Helix* case, *supra*, further confirms the split between the Third and Ninth Circuits. This split is of particular significance since the Third Circuit relied upon the language of the Ninth Circuit in *Joseph E. Seagram & Sons, Inc. v. Hawaiian Oke & Liquors, Ltd.*, 416 F.2d 71 (9th Cir. 1969), *cert. den.*, 396 U.S. 1062 (1970), to support its holding.

In the *Helix* case plaintiff contended that as a consequence of a contract, combination or conspiracy between the defendants plaintiff was excluded from the Pacific Northwest flour mill market, and that this constituted a violation of Section 1 of the Sherman Act (*i.e.*, a group boycott). The District Court granted a summary judgment in defendants' favor, and the Court of Appeals reversed.[1]

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1. Plaintiff also there asserted a violation of Section 7 of the Clayton Act. The District Court likewise granted summary judgment, upon this cause of action, which the Court of Appeals affirmed.

While the facts of the *Helix* case are dissimilar to those in our case (and we would submit not nearly so strong from the plaintiff's viewpoint), the legal issue, as to whether a specific anti-competitive purpose is required, is the same.

The Court in *Helix* arrived at the opposite conclusion from the Third Circuit in the instant case, and found that evidence of a specific anti-competitive purpose is *not* required. In so holding the Ninth Circuit (A-6) quoted the following language of this Court in *United States v. Griffith*, 334 U.S. 100, 105 (1948):

> "It is . . . not always necessary to find a specific intent to restrain trade or to build a monopoly in order to find that the anti-trust laws have been violated. It is sufficient that a restraint of trade or monopoly results as the consequence of a defendant's conduct or business arrangements."

The Court in *Helix* further stated (A-8) that:

> "We are not unmindful of the fact that Helix has abandoned its allegation that defendants acted with the specific anticompetitive purpose of excluding it from the market. We hold that such a specific intent need not be proven in the particular circumstances of this case."

In *Helix* defendants relied upon the *Seagram* case (which the Court there referred to as the *Hawaiian Oke case*), just as the Third Circuit did in the instant case. The Ninth Circuit distinguished that case (A-5) in the following language:

> "Defendants argue that our decision in *Hawaiian Oke* precludes a finding of a forbidden restraint of trade. *Hawaiian Oke* permitted the decision of a manufacturer to switch distributors for its product even though this meant excluding its former distributor from the market. This conclusion was conditioned, however, on the absence of 'an adverse pur-

> pose *or effect* on competition.' 416 F.2d at 78." (Emphasis added).

Thus, the Ninth Circuit recognized that under *Seagram* (or *Hawaiian Oke*) an anti-competitive *effect* is sufficient to make out a case. The Third Circuit's reliance upon that case to support its holding that an anti-competitive *purpose* is required, was, therefore, clearly misplaced.

We have been authorized by counsel in the *Helix* case for defendant General Foods Corporation to state to this Court that he intends to file a Petition for Certiorari from the Ninth Circuit's decision in *Helix*, in which he will rely upon the Third Circuit's decision in the instant case as evidence of a split between the Ninth and Third Circuits. This Court would then have before it two petitions for Certiorari from two diametrically opposed Circuit Court decisions upon the same antitrust issue, compounded by the fact that one of the two Courts relied upon language of the other as a basis for its holding. We respectfully submit that under these circumstances Certiorari should be granted to clarify the law upon this important issue.

Respectfully submitted,

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APPENDIX

Opinion of the United States Court of Appeals for the Ninth Circuit in *Helix Milling Company v. Terminal Flour Mills Co. and General Food Corporation.*

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

HELIX MILLING COMPANY,
Plaintiff-Appellant,

vs.

TERMINAL FLOUR MILLS CO.
AND GENERAL FOODS CORPORATION,
Defendants-Appellees.

No. 73-1831

OPINION

[September 18, 1975]

Appeal from the United States District Court
for the District of Oregon

Before: BROWNING and WRIGHT, Circuit Judges,

and LINDBERG,* District Judge.

WRIGHT, Circuit Judge:

Plaintiff Helix Milling Company (Helix) appeals the decision of the district court granting summary judgment and dismissing its claim for damages under §1 of the Sherman Act [15 U.S.C. §1] and §7 of the Clayton Act [15 U.S.C. §18]. We affirm the decision of the district court with respect to plaintiff's §7 claim but reverse and remand with respect to its §1 cause of action.

Helix operated a mill in Oregon for flour and millfeed which was destroyed by fire. Plaintiff alleged that the only feasible way to continue its milling and sales business was to acquire the assets of an existing mill in the Pacific Northwest. The cost of constructing a new mill was considered too great with respect to its limited profitability. Hence Helix approached defendant General Foods with an offer

*Senior District Judge, Western District of Washington.

to purchase its Igleheart mill at Pendleton, Oregon (which General desired to sell because it was not meeting its profit objectives). About the same time, defendant Terminal Flour Mills initiated negotiations with General to purchase the Igleheart mill.[1]

General and Terminal ultimately reached an agreement. General signed a contract to sell the Igleheart mill and sent it to Terminal for signature. Helix then sued to enjoin the acquisition and for damages for violation of §1 of the Sherman Act and §7 of the Clayton Act as well as for pendent claims based on unfair competition and trade defamation.

General subsequently sought to revoke its acceptance of Terminal's offer to purchase. However, Terminal indicated its acceptance of the contract, without signing it, and cross-complained for specific performance. After three years of litigation, Terminal dropped its cross-complaint and moved for summary judgment on the grounds that there could be no §7 violation without a completed acquisition and that the attempted acquisition could not have violated §1. The district court granted both motions.

Under Rule 56(c), F. R. Civ. P., summary judgment should be granted where the record shows "no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." As this court noted in *Bushie v. Stenocord Corporation*, 460 F.2d 116, 119 (9th Cir. 1972):

> The showing of a "genuine issue for trial" is predicated upon the existence of a legal theory which remains viable under the asserted version of the facts, and which would entitle the party opposing the motion (assuming his version to be true) to a judgment as a matter of law.

Quoting *McGuire v. Columbia Broadcasting System, Inc.*, 399 F.2d 902, 905 (9th Cir. 1968).

[1] Plaintiff offered to prove that at this time Terminal and General were two of the five remaining competitors for the Pacific Northwest flour and millfeed market, with Terminal holding 19.6% and General 10.3% of the market. It also alleged that General held 8% and Terminal 64% of the submarket for sales to the Defense Supply Agency, a market in which Helix had provided 56% of the sales prior to the destruction of its mill.

I. SHERMAN ACT CLAIM.

The plaintiff alleged that there was a Pacific Northwest flour and millfeed market as well as a submarket for sales to the Defense Supply Agency for which it and Terminal's sister corporation were the major suppliers. It asserted that the only feasible means to re-enter the market was to purchase an existing mill to supply its sales organization. It argued that the purchase of the only available mill by Terminal would necessarily have excluded it from the market and prevented it from resuming its pre-fire competition with Terminal.

Helix further alleged that, but for the contract between Terminal and General, it would have purchased the Igleheart mill. Plaintiff argues that the acquisition of the mill by Terminal would have violated both §1 of the Sherman Act and §7 of the Clayton Act.

In essence then, Helix alleged that there was a contract, combination or conspiracy to enter into an illegal acquisition which necessarily would exclude Helix from the Pacific Northwest flour and millfeed market and the regional submarket for DSA sales.

A major purpose of §1 of the Sherman Act is to foster competition and to protect the ability of competitors to enter markets. In *Associated Press v. United States*, 326 U.S. 1 (1945), the Supreme Court held invalid an AP by-law which permitted members to impose significant, often prohibitive, penalties on potential competitors seeking to join the organization. The Court stated:

> Trade restraints of this character, aimed at the destruction of competition, tend to block the initiative which brings newcomers into a field of business and

> to frustrate the free enterprise system which it was the purpose of the Sherman Act to protect.

326 U.S. at 13-14.

In a variety of contexts the courts have struck down collaborative actions which prevented competitors from entering a given market, *Associated Press, supra; United States v. General Motors*, 384 U.S. 127, 145 (1966); *Poller v. Columbia Broadcasting System, Inc.*, 368 U.S. 464 (1962); *Radiant Burners, Inc. v. Peoples Gas Light and Coke Co.*, 364 U.S. 656 (1961); *United States v. Griffith*, 334 U.S. 100, 107 (1948); *International Salt Co. v. United States*, 332 U.S. 392, 396 (1947) *Cataphote Corp. v. DeSoto Chemical Coatings, Inc.*, 450 F.2d 769, 774 (9th Cir. 1971), *cert. denied* 408 U.S. 929 (1972); *cf. Gough v. Rossmoor Corp.*, 487 F.2d 373, 378 (9th Cir. 1973).

Here the plaintiff argues that the defendants combined and used a contract of sale to exclude it from the Pacific Northwest flour and millfeed market. In a closed market, where the acquisition of existing production facilities is the only economically feasible method of entry, an agreement to acquire the only available facilities necessarily excludes a potential entrant.

The issue before us then is whether the agreement and contract between Terminal and General in November of 1969 was a restraint of trade or was merely "joint activity having a primary purpose and direct effect of accomplishing a legitimate business objective [having] an incidental and indirect effect upon the business of some competitors." *United States v. Hilton Hotels Corp.*, 467 F.2d 1000, 1003 (9th Cir. 1972), *cert. denied sub nom. Western International Hotels Co. v. United States*, 409 U.S. 1125 (1973); *Joseph E. Seagram & Sons, Inc. v. Hawaiian Oke & Liquors Ltd.*, 416 F.2d 71 (9th Cir. 1969), *cert. denied* 396 U.S. 1062 (1970).

It is no answer that plaintiff's suit aborted the acquisition with the result that Terminal never controlled the Igleheart mill and that the public retained the benefits of

two competing mills. *See Poller, supra*, at 473. The Sherman Act prohibits competitors from selecting who or what their competition will be, *Associated Press, supra*. This is particularly significant here where Helix alleges the existence of a submarket in which it was Terminal's major competitor and in which General played an insignificant role.

Defendants argue that our decision in *Hawaiian Oke* precludes a finding of a forbidden restraint of trade. *Hawaiian Oke* permitted the decision of a manufacturer to switch distributors for its product even though this meant excluding its former distributor from the market. This conclusion was conditioned, however, on the absence of "an adverse purpose or effect on competition." 416 F.2d at 78.

A jury could find such an unreasonable restraint of trade as a necessary consequence of the fact that Helix would have purchased the mill but for General's decision to sell it to Terminal, and that defendants' course of action would necessarily exclude competition from the market because of the closed nature of the market.

In *Hawaiian Oke*, the principal defendant was not in competition with the plaintiff. In *Poller* and *Bushie*, the defendants cancelled vertical arrangements with the plaintiffs in order to assume that business themselves. In *Poller*, CBS allegedly cancelled its affiliation with a UHF station, purchased a competing UHF license, and then purchased the assets of its former affiliate at distress prices in order to operate a UHF outlet for its programs in that market. In *Bushie*, the defendant cancelled its regional distributorship and opened a branch office to conduct a distribution business itself.

In the former case, the Supreme Court concluded that

> . . . if such a cancellation and purchase were part and parcel of unlawful conduct or agreement with others or were conceived in a purpose to unreasonably restrain trade, control a market, or monopolize, then such conduct might well run afoul of the Sherman Law.

368 U.S. at 468-469.

In *Poller*, the Court found that there was sufficient evidence from which a jury might have concluded that CBS intended to restrain trade in the relevant UHF market by eliminating independent UHF and destroying its former affiliate's business, 368 U.S. at 470-473. The Court held that it had been improper to grant a summary judgment and remanded the case for trial. *Id.*

In *Bushie*, the court found that there was no evidence that the cancellation restrained trade or was motivated by anticompetitive intent, 460 F.2d at 119. All the plaintiff adduced there was the fact of cancellation and the subsequent initiation of a branch office to conduct the distributing business.

The plaintiff here has alleged that the defendants restrained trade by entering a contract for an acquisition which would have violated §1 of the Sherman Act,[2] and the necessary effect of which would be to exclude plaintiff from the markets in question. As the Court noted in *United States v. Griffith*, 334 U.S. 100, 105 (1948):

> It is . . . not always necessary to find a specific intent to restrain trade or to build a monopoly in order to find that the anti-trust laws have been violated. It is sufficient that a restraint of trade or monopoly results as the consequence of a defendant's conduct or business arrangements.

A jury could find here such anticompetitive intent from defendants' action in agreeing to a course of action which would necessarily exclude Helix from the market, *Associated Press, supra; General Motors, supra,* and whose successful attainment would result in an acquisition which could be found to involve a violation of §1. The plaintiff has alleged the necessary market and the substantial shares of those markets held by General and Terminal. As the Court noted in *United States v. First National Bank*

[2] *United States v. First National Bank and Trust Co. of Lexington*, 376 U.S. 665, 671 (1964).

and Trust Co. of Lexington, 376 U.S. 665, 671-672 (1964), speaking of the railroad merger cases:

> . . . where merging companies are major competitive factors in a relevant market, the elimination of significant competition between them, by merger or consolidation, itself constitutes a violation of §1 of the Sherman Act.

Given the plaintiff's allegation and offer of evidence, it was error to grant summary judgment.

The district court also noted that, in order to find a combination in this case, it would have been necessary to prove an agreement between defendants that neither of their mills would be sold to Helix. This misstates the rule. Proof of participation in a course of conduct that has the necessary consequence of barring entry of competition into the market would provide the basis for a finding of a combination. *Albrecht v. Herald Co.*, 390 U.S. 145, 149-150 (1968); *Pearl Brewing Co. v. Anheuser-Busch Co.*, 339 F. Supp. 945, 950 (S.D. Texas, 1972). The collaboration of the person necessary to establish a combination need not even be willing. *Albrecht* at 150 n.6.

Similarly, plaintiff introduced evidence that defendants entered into a contract[3] to complete the acquisition, signed by General, against whom enforcement was sought by Terminal for three years following the initial agreement. The plaintiff argues that this contract excluded it from the market and that Terminal's action in seeking specific performance extended the exclusionary impact beyond the period of the initial agreement. The effect on Helix is alleged to be the same as though the acquisition had been completed. It was excluded from the market in either event.

Hence there was evidence which, interpreted in the light most favorable to the plaintiff, would support a finding of a contract or combination to restrain trade. It

[3] We have held that the term "contract" should be interpreted broadly, *Beverage Distributors, Inc. v. Olympia Brewing Co.*, 440 F.2d 21, 30 (9th Cir.), *cert. den.* 403 U.S. 906 (1971).

was error to prevent the plaintiff from attempting to prove this claim.

Since such a finding of the exclusion of a competition by collaborative action having the necessary effect of restraining trade would violate the Sherman Act, no additional showing of "public injury" is necessary to support a private action for damages. *Radiant Burners, Inc. v. Peoples Gas Light and Coke Co., supra*, 364 U.S. at 660; *Lamb Enterprises, Inc. v. Toledo Blade Co.*, 461 F.2d 506, 517-18 (6th Cir. 1972), *quoting Rogers v. Douglas Tobacco Board of Trade, Inc.*, 266 F.2d 636 (5th Cir. 1959); *Switzer Brothers, Inc. v. Locklin*, 297 F.2d 39, 47 (7th Cir. 1961). *See also Richfield Oil Corp. v. Karseal Corp.*, 271 F.2d 709, 727-28 (9th Cir. 1959).

Plaintiff, of course, must prove that it would have purchased the mill but for the contract between Terminal and General. This involves proof both that General would have made the sale and that Helix would have been able to purchase it and re-enter the milling and sales market, *see Martin v. Phillips Petroleum Co.*, 365 F.2d 629 (5th Cir.), *cert. den.* 385 U.S. 991 (1966), *reh. denied* 386 U.S. 930 (1967).

Our holding is a limited one, given the unusual factual context of this case. We are not unmindful of the fact that Helix has abandoned its allegation that defendants acted with the specific anticompetitive purpose of excluding it from the market. We hold that such a specific intent need not be proven in the particular circumstances of this case.

We are faced here with an allegedly closed market where acquisition is the only feasible means of entry. Plaintiff alleges that but for the actions of the defendants, including the aborted contract of sale, it would have purchased the only available productive facility and resumed competition within the market in question. In such a factual setting, where entry to the market by the plaintiff allegedly is prevented by a merger or acquisition which would violate §1 of the Sherman Act and where the defendants were

aware of the bid by the plaintiff, there is a Sherman Act §1 cause of action.[4]

II. CLAYTON ACT CLAIM.

The district court granted summary judgment for the defendants on the Clayton Act §7 claim, basing its decision on the fact that no acquisition had taken place. We affirm.

It has long been established that there is a private cause of action for damages under §7, *Carlson Companies, Inc. v. Sperry and Hutchinson Co.*, CCH 1974-2 Trade Cases ¶75-428 (8th Cir. 1974); *Gottesman v. General Motors Corp.*, 414 F.2d 956 (2d Cir. 1969); *Dailey v. Quality School Plan, Inc.*, 380 F.2d 484 (5th Cir. 1967); *Bay Guardian Co. v. Chronicle Publishing Co.*, 340 F. Supp. 76 (N.D. Cal. 1972); *Kirihara v. Bendix Corp.*, 306 F. Supp. 72 (D. Haw. 1969); *Isador Weinstein Investment Co. v. Hearst Corp.*, 310 F. Supp. 390 (N.D. Cal., 1970); *Zenith Vinyl Fabrics Corp. v. Ford Motor Co.*, 357 F. Supp. 133, 136 (E.D. Mich. S.D. 1973).

A claim has been permitted, however, only in cases in which an acquisition has been completed. In the only case in which damages were sought for an uncompleted merger, *GAF Corp. v. Circle Floor Co.*, 329 F. Supp. 823, 829 (S.D.N.Y. 1971), the court held that no cause could be allowed because the possibility of proving damages was too remote. The Second Circuit affirmed on the ground that no competitive injury had been alleged, 463 F.2d 752, 758-759 (2d Cir. 1972). In *Carlson*, the court implied that only a completed merger could provide a cause of action for damages.

---

[4] We express no view as to whether the doctrine discussed in *Rex Chainbelt Inc. v. Harco Products, Inc.*, 512 F.2d 993 (9th Cir. 1975), decided after this case was submitted, may affect any claim to damages resulting from the assertion by Terminal of its counterclaim and General Foods' refusal to sell the mill to Helix while that counterclaim was pending. *See also Ansul Co. v. Uniroyal Inc.*, 448 F.2d 872, 882 (2d Cir. 1971); *Kobe v. Dempsey Pump Co.*, 198 F.2d 416, 424-25 (10th Cir. 1952).

The language of §7 speaks in terms of a completed acquisition rather than an attempted merger.[5] We can find no compelling reason for extending the reach of §7 to an uncompleted merger.

The decision of the district court is affirmed as to plaintiff's §7 claim and reversed and remanded as to its §1 claim.

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[5] 15 U.S.C. §18 (1974):

"No corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another corporation engaged also in commerce, where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly."

Supreme Court, U. S.
FILED
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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1975

No. 75-229

ARMEN DE FILIPPO and SHELDON FLEISHMAN,
t/a A&S, a Partnership,

Petitioners,

v.

FORD MOTOR COMPANY,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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QUESTION PRESENTED.

Should this Court grant certiorari in a case where the jury, by its answers to written questions submitted to it pursuant to Federal Rule of Civil Procedure 49(a), rejected the only theory of liability upon which the case was tried—that respondent Ford and certain Philadelphia area Ford dealers had engaged in a *per se* illegal group boycott—and the holding of the court of appeals, based on the jury's findings, was not in conflict with any prior decision of this Court or of any lower court, created no "exception" to group boycott principles, and did not violate any Seventh Amendment right of the plaintiff to a trial by jury.

COUNTERSTATEMENT OF THE CASE.

Petitioners' complaint charged that respondent Ford Motor Company and its Philadelphia area dealers conspired to eliminate petitioners as Ford dealers by preventing them from becoming dealers at the Presidential Ford dealership. Petitioners (hereafter referred to as "plaintiffs") asserted that Ford and its dealers had engaged in a group boycott which was illegal *per se* under Section 1 of the Sherman Act, 15 U. S. C. § 1 (1970). (21a-22a, 33a-37a, 42a-43a.) [1]

Plaintiffs became Ford dealers at Chestnut Motors in West Philadelphia in early 1969. Eight and a half months later the Chestnut physical facilities, leased from the previous dealer, were destroyed by fire. Thereupon, plaintiffs and Ford discussed the possibility of plaintiffs acquiring a different dealership in the Philadelphia area. The discussions focused on Presidential, a dealership and facilities owned and operated by Ford itself. (App. A at 4a.)

On December 18, 1969, plaintiffs signed a written offer to purchase the assets (excluding the real estate) of Presidential.[2] The offer contemplated an investment

1. Citations to the appendices to the petition identify the specific appendices by the abreviation "App." and the appropriate letter designations, and state the appendix page numbers (*e.g.*, "App. A at 1a"). Citations to the appendix in the court below state only the appendix page numbers. The page numbers of volumes 1 and 2 of the appendix below have the suffix "a" (*e.g.*, "21a-22a"); the page numbers of volume 3 of the appendix below have the suffix "ex" (*e.g.*, "250ex"). Trial exhibits, which are reproduced in volume 3, are referred to by the numbers used at trial (*e.g.*, "D-64"). Citations to pages of the trial transcript not reproduced in the appendix below have the prefix "Tr."

2. Plaintiffs improperly refer to the document plaintiffs signed as "the Agreement." *See e.g.*, petition at 4. The instrument which plaintiffs signed, by its own terms, was not an "agreement." It was an offer to purchase, and it was never signed or otherwise "accepted" in writing by any Ford representative (P-116, 170ex, Tr. 241; Tr. 2159). While the jury did find that a contract had been made, whatever that "contract" was, it was not the instrument itself. The court of appeals recognized that the sufficiency of the evidence to support the jury's finding was "suspect" but did not pass on the question because, as both the district court and the court of appeals found, any alleged contract was unenforceable under Pennsylvania's Statute of Frauds, 12A P. S. § 2-201 (1970). (App. A at 16a, 20a.)

arrangement similar to that under which plaintiffs had operated Chestnut, with plaintiffs to invest 20% of the capital, Ford to invest 80% of the capital and plaintiffs to apply a certain portion of the profits to buy out Ford's investment. The plaintiffs were not to provide their 20% by new capital; rather, Ford was to credit them with the value of their interest in Chestnut immediately prior to, and undiminished by their losses resulting from, the fire. Plaintiffs' offer had two special features, on which plaintiffs insisted:

> (1) Plaintiffs could manage Presidential with only Ford's capital at risk for an initial three month period after which plaintiffs might put their own 20% of the capital at risk and proceed with the deal, and
>
> (2) If they proceeded with the deal, plaintiffs would defer payment of 50% of the first year's rent and 25% of the second year's rent on the Ford-owned real estate until the fourth and fifth years of the dealership.[3]

Other Philadelphia area Ford dealers, upon learning of the proposal, protested to Ford about the two special features. They feared that plaintiffs, during the period they had no money at risk, would use Ford's money to subsidize losses and thus gain an unfair competitive advantage over dealers who had their own capital at risk.

3. App. A at 4a-5a; P-116, 170ex, Tr. 241; 69a-70a, 123a-24a, 343a-44a, 635a, 642a-43a, 648a-49a; P-71, 112ex, Tr. 2781; P-98, 141ex, Tr. 560; P-114, 159ex, Tr. 1739.

They also feared that deferring the rent would give plaintiffs an unfair cost advantage. The dealers *never* objected to plaintiffs' becoming Ford dealers at Presidential or any other dealership; they objected only to the special terms.[4]

Ford's legal department, concerned about conflict with the Robinson-Patman Act, 15 U. S. C. §§ 13(d), (e) (1970), advised Ford that the deferred rent provision was unacceptable unless also offered to other dealers. Ford then discussed with other dealers the possibility of offering them deferred rent plans, and even considered the purchase and leaseback of dealer-owned real estate so that deferred rent plans could be offered to all dealers. Problems were posed, however, by dealers who did not want to sell their real estate to Ford and lease it back, and by dealers who were concerned about the disadvantage they would suffer because of the delayed investment feature. (App. A at 5a.)

Ford had two options (287a-90a, 629a-36a):

(1) Accept plaintiffs' proposed terms, commit itself to the onerous process of purchasing and leasing back the real estate of a number of its dealers, and risk further dealer complaints and possible lawsuits (which had been threatened) (P-167, 232ex., Tr. 4151; D-64, 276ex, 286ex, 291ex, Tr. 4151; 160a, 600a), or

(2) Reject plaintiffs' proposal and attempt to work out a deal with them which eliminated the objectionable special terms.

Ultimately, the vice-president and general manager of Ford decided not to consummate the Presidential proposal as it was structured. On January 9, 1970, he traveled to Philadelphia and announced his decision to the dealers. At the same time he instructed the Philadelphia sales manager to tell plaintiffs that Ford had no objection to plaintiffs' taking over the Presidential dealership without the delayed investment and delayed rental features. Ford then offered to discuss such a deal with plaintiffs, but plaintiffs did not respond.[5] Instead, they filed this antitrust action seeking treble damages, attorneys' fees and costs. (App. A at 5a-6a; 391a-92a, 629a-36a.)[6]

Plaintiffs tried the case on a single theory of liability—that Ford and its Philadelphia area dealers had engaged

4. App. A at 5a, 15a; 569a-70a, 643a-46a, 159a-61a, 389a-90a, 394a, 410a-13a, 416a, 420a, 424a-25a, 460a-63a, 465a-66a, 561a-64a, 567a, 577a-84a, 587a, 591a, 602a, 634a-35a; D-64, 276ex, 282ex, 284ex, 285ex, 290ex, 291ex, 293ex-94ex, Tr. 4151; 376a-77a.

5. Plaintiffs' statement of the case improperly omits mention of Ford's offer to deal with the plaintiffs without the special terms and plaintiffs' failure to respond. These are important facts which the court of appeals took into account (App. A at 6a, 15a).

6. At page 6 of plaintiffs' petition, plaintiffs state certain allegations concerning the circumstances of the eventual termination of their interest in Chestnut. Ford has not responded to those allegations in full since they are not material to the issues raised by the petition, but Ford does wish to make clear that it does not agree with plaintiffs' statement. The discussions plaintiffs refer to took place nearly two months after the rejection of plaintiffs' offer for Presidential. By that time, Chestnut was completely closed, out of business and liquidated, and cumulative post-fire losses had erased the pre-fire profits (370a-71a; D-112, 347ex, Tr. 2201; Tr. 2193-94, Tr. 2199-2201). Although plaintiffs were then entitled to nothing under their investment contract, Ford offered to give them the pre-fire value of their interest in Chestnut, calculated at $88,000, in exchange for a release. On advice of counsel, plaintiffs refused to sign a release; they also refused to resign from the defunct dealership. Since a law suit had been threatened, Ford was not willing to give plaintiffs the $88,000 without a release, and since plaintiffs had refused to resign, it was necessary for Ford, in order to close out the dealership, to exercise the formal rights it had as preferred shareholder under the investment contract (112a, 353a-56a, 478a-79a, 370a-71a, 430a-31a; Tr. 2861-66; P-105, 156ex, Tr. 236; P-107, 158ex, Tr. 236). The jury, by its answer to interrogatory 12, found that plaintiffs' interest in Chestnut was worthless at the time these events took place (826a). The court of appeals has sustained that finding (App. A at 22a) and plaintiffs do not challenge it here.

in an illegal *per se* group boycott to exclude plaintiffs as Philadelphia area Ford dealers by preventing them from becoming dealers at Presidential (App. A at 12a; 21a-22a, 33a-37a, 42a-43a). The district court submitted this theory to the jury pursuant to Federal Rule of Civil Procedure 49(a) by special written interrogatories 1 and 2, which are quoted in full in the court of appeals' opinion (App. A at 11a-12a).

Under the scheme of the district court's interrogatories, an affirmative answer to both interrogatories 1 and 2 was needed to support a finding of liability. The first interrogatory asked the jury whether Ford's rejection of the single set of terms plaintiffs had proposed for the purchase of Presidential was the result of concerted action between Ford and its dealers. The jury found that it was. The second interrogatory concerned the purpose of the concerted action. The jury's answer to that interrogatory was that "the purpose of the agreement . . . between Ford and its Philadelphia area dealers" was *not* "to prevent plaintiffs from becoming Ford dealers in the greater Philadelphia area on any terms" (App. A at 11a). The jury thus rejected the boycott theory on which petitioners had tried the case. Deplorably, plaintiffs' petition fails even to mention special interrogatory 2 and the jury's negative answer to it (*see, e.g.*, petition at 6-7).

Although the jury had rejected the group boycott theory of liability, it nevertheless gave an affirmative answer to a third special interrogatory (quoted in full at App. A, 12a), which, despite objections by all parties, the district court had submitted under a "rule of reason" theory of liability. The parties had objected to the interrogatory because the case had not been tried on—and there was no evidence to support—such a theory. (App. at 12a; App. C at 35a-36a.) Based on the answer to the third interrogatory, the jury went on to answer interrogatories about in-

jury and damages, and the trial court entered judgment for the plaintiffs (App. A at 4a; App. C at 58a; 830a; 718a).[7]

In ruling on Ford's post-trial motion for judgment notwithstanding the verdict, the district court rejected the answer to special interrogatory 3 as a basis of liability, admitting that the parties had been right and that there was no evidence to support "rule of reason" liability (App. A at 12a; App. C at 35a-36a). Nevertheless, the district court refused to grant judgment for Ford. Instead, it attempted to supply the missing ingredient of a *per se* illegal group boycott by a post-trial fact finding of its own (App. C at 58a, 40a-43a). Ford appealed.

The court of appeals reversed and ordered that judgment be entered for Ford (App. A at 23a-24a). It first confirmed that the district court had correctly disregarded special interrogatory 3 as "improvidently submitted to the jury" (App. A at 12a), holding that "plaintiffs' case was tried strictly on a theory of *per se* illegality and not under the 'rule of reason'" (*ibid.*). Then, pursuant to the jury's finding that Ford and its dealers had no purpose to keep the plaintiffs from becoming Ford dealers (App. A at 13a), it flatly rejected the district court's post-trial finding of fact as ". . . contrary to the evidence adduced at trial. . . ." (App. A at 15a). In short, said the court of appeals, plaintiffs had ". . . failed to prove their case . . ." (*ibid.*).

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7. In addition to an antitrust claim, the plaintiffs had asserted a claim under the Automobile Dealers Day in Court Act, 15 U. S. C. § 1222 (1970), and claims under Pennsylvania law for breach of contract and for breach of an alleged quasi-contractual obligation on Ford's part to return to plaintiffs the value of their interest in Chestnut prior to the fire (without diminution for losses suffered as a result of the fire). The district court directed a verdict on the latter claim (656a) and, on the basis of the jury's answers to pertinent special interrogatories, entered judgment for Ford on the others (App. A at 6a-7a). Plaintiffs cross-appealed from these judgments and the court of appeals affirmed (App. A at 20a, 22a). Plaintiffs' petition for a writ of certiorari raises no issues with respect to these judgments.

ARGUMENT.

The court of appeals simply held that, in view of the jury's findings that although there had been joint action, Ford and its dealers had had no purpose to exclude plaintiffs as Ford dealers in the Philadelphia market, plaintiffs had failed to establish a *per se* illegal group boycott. Plaintiffs do not attack the jury's findings. Rather, their petition attacks the reasoning of the court of appeals, asserting that its holding is in conflict with holdings of this Court and other courts of appeals, deprives them of their Seventh Amendment right to a trial by jury and "has virtually eliminated the group boycott as an effective method of enforcing the Sherman Act" (petition at 20). The assertions of the petition cannot withstand analysis and raise no question which merits the attention of this Court.

The court below carefully analyzed and scrupulously followed this Court's group boycott cases. Its discussion appears at pages 7a-11a of Appendix A to the plaintiff's petition. Plaintiffs' point to the court of appeals' conclusion, founded on its review of this Court's decisions, that "a concerted activity constitutes a 'group boycott' and is considered *per se* 'in restraint of trade' when 'there [is] a purpose either to exclude a person or group from the market, or to accomplish some other anti-competitive objective, or both.'" (App. A at 11a, quoting from *Joseph E. Seagram & Sons, Inc. v. Hawaiian Oke & Liquors, Ltd.*, 416 F. 2d 71, 76 (9th Cir. 1969), *cert. denied*, 396 U. S. 1962 (1970).) From this statement plaintiffs would conjure up a conflict. But they erroneously contend that "the purpose or motivation of a group is irrelevant to the existence of a prohibited group boycott" (petition at 9), citing *United States v. General Motors Corp.*, 384 U. S. 127 (1966); *Fashion Originators' Guild of America v. FTC*,

312 U. S. 457 (1941). These cases do not so hold, and they do not conflict with the instant case.

Plaintiffs fail to distinguish between the immediate purpose of concerted action which necessitates its classification as a *per se* offense, and a business justification offered for such conduct once its *per se* illegality has been determined. The very passage from *General Motors* which the plaintiffs quote at page 9 of their petition confirms this distinction:

> "The principle of these [group boycott] cases is that where businessmen concert their actions *in order to deprive others of access to merchandise which the latter wish to sell to the public*, we need not inquire into the economic motivation underlying their conduct." (384 U. S. at 146; emphasis added.)

In *General Motors*, the critical element of the group boycott was thus the conspirators' purpose "to deprive others of access to merchandise."[8] That fundamental purpose or object of the joint action brought the case within the *per se* category and thus rendered irrelevant the business justification proffered by defendants—the preservation of dealer profit margins and the manufacturer's distribution system (*ibid.*). Similarly, in *Fashion Originators' Guild of America v. FTC*, 312 U. S. 457 (1941), the Court made an initial holding that ". . . [t]he *purpose and object* of this combination, its potential power, its tendency to monopoly, the coercion it could and did practice upon a rival method of competition, all

8. The Court in *General Motors*, in making its determination of *per se* illegality, noted additional conspirational purposes "to eliminate the discounters from participating in the market" (*id.* at 144) and "to protect franchised dealers from real or apparent price competition" (*id.* at 147).

brought it within the policy of the prohibition declared by the Sherman and Clayton Acts" (*id.* at 467-68; emphasis added). Only then did it consider and reject as irrelevant the alleged business justification of "protect[ing] . . . against the devastating evils growing from the pirating of original designs" (*id.* at 467).

In the instant case, the jury answered "No" to the only question put to it which might have established the essential requirement of an "unlawful object" (*Fashion Guild, supra,* 312 U. S. at 468), and plaintiffs do not challenge that finding. Whether or not there was a reasonable "business justification" was never even raised as an issue. In such circumstances, the court of appeals' holding that there was no jury determination which established the elements of a group boycott was plainly in harmony—not in conflict—with this Court's holdings in *General Motors* and *Fashion Guild.*

Neither does the decision below, as is alleged by plaintiffs at pages 10-11 of their petition, conflict with the holding of the Ninth Circuit in *United States v. Hilton Hotels Corp.,* 467 F. 2d 1000 (1972), *cert. denied,* 409 U. S. 1125 (1973). In *Hilton,* hotel operators agreed to give preferential treatment to suppliers who contributed to a fund to attract convention business to their city and to curtail purchases from those suppliers who did not. The court found the restraint a classic example of coercion which was "forbidden without more" (*ibid.*), and declared:

> "The primary purpose and direct effect of defendants' agreement was to bring the combined economic power of the hotels to bear upon those suppliers who failed to pay. The exclusion of uncooperative suppliers from the portion of the market represented by the supply requirements of the defendant hotels was the object of the agreement, not merely its incidental consequence." (*Id.* at 1003-04.)

This holding that the agreement in *Hilton* had both coercive and exclusionary purposes makes clear the vast difference between *Hilton* and the instant case, where there is an unchallenged jury finding that no purpose to exclude existed, and where coercion was not even suggested as an issue.[9]

Plaintiffs make the alternative contention that the jury in fact found the requisite anti-competitive purpose by its answer to interrogatory 3, and they claim that the court of appeals, in rejecting their contention, infringed their Seventh Amendment right to a jury trial (petition at 11-14). But by counsel's own admission, plaintiffs did not even purport to offer evidence concerning the issues dealt with by interrogatory 3. In vehemently objecting to the submission of that interrogatory to the jury, plaintiffs' counsel argued:

> ". . . [C]oncerted refusal to deal I will concede is the only antitrust violation we have tried to prove. . . . We did not try to prove as a matter of fact unreasonable restraint of trade because . . . to prove an unreasonable restraint of trade would require just

9. Plaintiffs also suggest at pages 10-11 of the petition that the Ninth Circuit, in *Hilton,* rejected its own decision in *Joseph E. Seagram & Sons, Inc. v. Hawaiian Oke & Liquors, Ltd.,* 416 F. 2d 71 (1969), *cert. denied,* 396 U. S. 1062 (1970, which the court below quoted (App. A at 11a). This is not so. In *Hilton,* the Ninth Circuit cited *Seagram* with approval, distinguishing it as "a case in which joint activity [had] a primary purpose and direct effect of accomplishing a legitimate business objective [and was] also alleged to have had an incidental and indirect adverse effect upon the business of some competitors" (*Hilton, supra,* 467 F. 2d at 1003). It has also cited *Seagram* with approval since *Hilton* (*Chisholm Bros. Farm Equipment Co. v. International Harvester Co.,* 498 F. 2d 1137, 1144, *cert. denied,* 419 U. S. 1023 (1974). *Seagram* has also been cited with approval by the Fifth Circuit in *E. A. McQuade Tours, Inc. v. Consolidated Air Tour Manual Comm.,* 467 F. 2d 178, 187 (1972), *cert. denied,* 409 U. S. 1109 (1973) and the Tenth Circuit in *Colorado Pump & Supply Co. v. Febco, Inc.,* 472 F. 2d 637, 640, *cert. denied,* 411 U. S. 987 (1973).

> an incredible amount of evidence. . . . So you put us in a position where you are submitting an issue of fact to the jury, which we didn't try to prove. We have to lose on that because we never tried to prove it because it is not an issue of fact, sir. This is an issue of law." (662a.)

There is obviously no Seventh Amendment right in issue here, and the court below had ample ground for its holding (App. A at 12a).[10]

In any event, plaintiffs cannot torture interrogatory 3 into a finding of a *per se* illegal anti-competitive objective. On its face, the interrogatory contained no reference to purpose or *per se* illegality; it spoke only of "unreasonable restraint of trade." While the district court's cryptic charge relating to interrogatory 3 contained general references to the purpose of the concerted action, it specified no particular purpose, and certainly did not specify any pernicious anti-competitive purpose sufficient to render the defendants' conduct illegal *per se*. The jury's answer to interrogatory 3 simply does not mean what plaintiffs would have it mean.[11]

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10. Plaintiffs assert at page 13 of the petition that their counsel objected to interrogatory 3 on the basis of an incorrect assumption as to what the court would charge the jury with respect to interrogatory 3. The record does not bear this out. It shows that, although counsel did not know the contents of the charge when he made the remarks quoted in the text, the trial judge distributed a draft copy of the charge the day before the charge was given, plaintiffs' counsel submitted a written objection to interrogatory 3 after receipt of the draft, and he affirmed the written objection after the court had delivered its actual charge to the jury (Tr. 4474-75, 4524-27; 808a).

11. Plaintiffs assert on page 5 of their petition and in footnote 1 on pages 12 and 13 of their petition that they offered sufficient evidence of an anti-competitive purpose to support the jury's alleged finding of such a purpose. They say that their evidence "established" that the "real motive" of the complaining dealers was to eliminate plaintiffs as dealers and to eliminate Presidential

Plaintiffs' final contention (petition at 15-19) is that the court of appeals has "propounded a major exception to the group boycott prohibition, namely, that a group boycott is legal if it seeks to deprive a competitor of 'special terms' which he has negotiated with a supplier" (petition at 15). This contention has no more substance than plaintiffs' prior contentions, for the court announced no such "exception."

The facts found by the jury brought the case squarely within the usual rules governing group boycotts. In contrast to the cases in which group boycotts have been found,[12] there was no combination of many suppliers, no complete refusal to deal and no purpose to eliminate plaintiffs as competitors, to deny them access to products or markets, or to coerce their business practices. All that occurred was the rejection of a single set of special terms more favorable to plaintiffs than those generally available to plaintiffs' dealer-competitors. Left open were an in-

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11. (Cont'd.)
as a dealership. The jury's answer to interrogatory 2 refutes the first proposition, and the second proposition was never an issue in the case, was never tried, and, in spite of plaintiffs' unwarranted assertions, is not established by a few fragments of evidence taken out of context from the record of a seven-week trial.

12. For example, boycotts were found in *United States v. General Motors Corp.*, 384 U. S. 127 (1966) (auto dealers refused to deal with price cutting discounters in order to deny them access to products); *Klor's, Inc. v. Broadway-Hale Stores, Inc.*, 359 U. S. 207 (1959) (appliance suppliers would not sell to discounter or would sell "only at discriminatory prices and highly unfavorable terms" (*id.* at 209) as part of a scheme to drive plaintiff "out of business as a dealer in the defendants' products" (*id.* at 213); *Fashion Originators' Guild of America v. FTC*, 312 U. S. 457 (1941) (garment suppliers refused to deal with certain retailers in order to coerce the retailers not to handle garments made by style pirates and thereby to eliminate style pirates from the market); *Eastern States Retail Lumber Dealers Ass'n v. United States*, 234 U. S. 600 (1914) (retail lumber dealers refused to deal with wholesalers who sold direct to consumers in order to force the wholesalers to eliminate direct sales to consumers).

finite number of other possible terms. And, as the court below pointed out, Ford was willing to discuss other terms; it was the plaintiffs who were not (App. A at 6a). Plaintiffs have pointed to no case which found a group boycott in such circumstances, and there is none.[13]

In declining to find a group boycott on the facts of this case, including the jury's express rejection of the only boycott theory put to it, the court of appeals did not announce that group boycotts aimed at "special terms" would necessarily be lawful in all cases. And neither did the court hold that the concerted action of Ford and its dealers was "reasonable" under a "rule of reason" standard; that issue, as the court found (App. A at 12a), was never raised by plaintiffs and never tried. The court simply found that plaintiffs had failed to prove the case they tried (App. A at 15a).

The decision in no way conflicts, as plaintiffs contend (petition at 16-19), with this Court's h[illegible]ing in *Silver v. New York Stock Exchange*, 373 U. S. 341 (1963), or the Fifth Circuit's holding in *North Texas Producers Association v. Young*, 308 F. 2d 235 (1962), *cert. denied*, 372 U. S. 929 (1963). *Silver* did not involve the denial of special terms; rather, it involved the complete denial of access to a service available to plaintiffs' competitors which, according to the Court, plaintiffs "needed in order to compete effectively as broker-dealers in the over-the-counter

13. Courts have uniformly declined to find *per se* illegal group boycotts in the absence of a purpose to exclude, deny access to products or coerce business practices. *See, e.g., E. A. McQuade Tours, Inc. v. Consolidated Air Tour Manual Comm.*, 467 F. 2d 178 (5th Cir. 1972), *cert. denied*, 409 U. S. 1109 (1973); *Joseph E. Seagram & Sons Inc. v. Hawaiian Oke & Liquors, Ltd.*, 416 F. 2d 71 (9th Cir. 1969) *cert. denied*, 396 U. S. 1062 (1970); *Ace Beer Distributors, Inc. v. Kohn, Inc.*, 318 F. 2d 283 (6th Cir.), *cert. denied*, 375 U. S. 922 (1963); *Packard Motor Co. v. Webster Motor Car Co.*, 243 F. 2d 418 (D. C. Cir.), *cert. denied*, 355 U. S. 822 (1957).

market" (373 U. S. at 347). *North Texas* was not even a group boycott case. Liability in that case was based solely on price fixing and monopolization, and the case did not involve any question of "special terms" (*see, North Texas, supra*, 308 F. 2d at 241). Neither *Silver* nor *North Texas* lends support to plaintiffs' petition.

CONCLUSION.

In this case, the jury found for Ford and against plaintiffs on the only antitrust issue that was tried and properly submitted to it. After a thorough review of the lengthy record and the applicable law, the court of appeals, without announcing any new legal theories, unanimously affirmed that verdict. For the reasons stated, plaintiffs' petition should be denied.

Respectfully submitted,

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Supreme Court, U. S.
FILED
SEP 22 1975

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1975

No. 75-229

ARMEN DE FILIPPO and SHELDON FLEISHMAN
t/a A & S, *a Partnership*,

Petitioners

v.

FORD MOTOR COMPANY,

Respondent

PETITIONER'S REPLY BRIEF

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PETITIONERS' REPLY BRIEF

1. Respondent's Brief in Opposition to the Petition for Certiorari is Based upon a Fallacious Legal Premise.

Respondent's Brief in Opposition to the Petition for Certiorari is based upon a legal premise which: (1) is beyond the scope of the holding of the Court of Appeals; and (2) is unsupported and unsupportable by the decisions of this or any other court.

In its Opposing Brief, Respondent has argued that an affirmative answer to Special Interrogatory No. 2 was a requisite to a finding of a *per se* group boycott, and that the jury's negative answer to that Interrogatory defeated Petitioner's group boycott case. (See pages 6, 10, 14 and "Question presented" of Respondent's Opposing Brief). That Interrogatory asked the jury whether:

> ". . . the *purpose* of the agreement, if any, between Ford and its Philadelphia area dealers was to prevent plaintiffs from becoming Ford dealers in the greater Philadelphia area *on any terms*?" (App. 11a). (Emphasis added).

An affirmative answer to Interrogatory No. 2 would have required a finding of a specific purpose on the part of the conspirators to exclude plaintiffs as Ford dealers in the Philadelphia area *"on any terms"; i.e.*, a purpose to totally exclude plaintiffs from the Philadelphia marketplace.

The Court of Appeals, however, did not hold that a purpose to *totally* exclude plaintiffs from the marketplace was a requisite of a group boycott. To the contrary, the Court held that:

> ". . . a concerted activity constitutes a 'group boycott' and is considered per se 'in restraint of trade' when 'there [is] a purpose *either* to exclude a person or group from the market, *or* to accomplish some other

anti-competitive objective, or both.'" (App. 11a). (Emphasis added).

Thus, even under the holding of the Court of Appeals, an affirmative answer to Interrogatory No. 2 was not a requisite to a finding of a group boycott.

Respondent has not cited a single case to support the premise that a purpose to totally exclude plaintiffs from the marketplace is a requisite of a group boycott. The reason for this is quite obvious; there are no such cases, and indeed, the cases are to the contrary.

As we have pointed out in our Petition for Certiorari, *no* specific purpose is a requisite of a group boycott.[1] In dealing with group boycotts the courts are concerned not with purpose, but with consequences. From this it follows, *a fortiori*, that a purpose to totally exclude is not a requisite of a group boycott. Indeed, it is clear from the decisions of this Court that a group boycott need not even have the *effect* of a total exclusion from the marketplace.

In *United States v. General Motors Corp.*, 384 U.S. 127 (1966), this Court found a group boycott where, as the result of group action, franchised Chevrolet dealers were prevented from selling new Chevrolets to non-franchised dealers (discounters). This Court cited alternative bases for the group boycott finding: (a) that the discounters were denied access to new Chevrolets; and (b) that the franchised dealers were deprived of the opportunity to sell to discounters, if they so chose. Neither the discounters nor the franchised dealers, however, were totally excluded from the automobile marketplace. The discounters were merely denied access to one type of product, new Chevrolets; and the franchised dealers were merely denied

1. As we have also pointed out, even if, as the Court of Appeals held, an anti-competitive purpose is a requisite of a group boycott, the jury found such a purpose and the record amply supports the finding.

the opportunity to sell one type of product, new Chevrolets, to one type of customer, discounters.

In *Silver v. New York Stock Exchange*, 373 U.S. 341 (1963), this Court found a group boycott where, as the result of group action, a securities dealer was denied access to direct telephone lines to members of the New York Stock Exchange. In language quoted at page 16 of our Petition for Certiorari, this Court held it immaterial that the refusal to deal with plaintiff was not total, and held that group action which resulted in a denial of a "business advantage" was enough to constitute a group boycott.

In *Associated Press v. United States*, 326 U.S. 1 (1944), this Court found a group boycott where, as the result of group action, nonmembers of the Associated Press were prevented from buying news from Associated Press or its members. The defendant contended that a group boycott had not been proved because there were three other news agencies from which nonmembers of Associated Press could buy news; *i.e.*, that there was not a total exclusion. This Court rejected that contention, stating, at page 17, that it was sufficient to constitute a group boycott that nonmembers were placed at a "competitive disadvantage".

There are also several Court of Appeals' decisions holding that a total exclusion from the market is not a requisite of a group boycott. See *Ricci v. Chicago Mercantile Exchange*, 447 F.2d 713 (7th Cir.), *aff'd*, 409 U.S. 289 (1973);[2] *Ford Motor Co. v. Webster's Auto Sales*, 361 F.2d 874 (1st Cir 1966);[3] and *Gamco, Inc. v. Providence Fruit*

2. A group boycott was found where group action resulted in plaintiff's loss of membership on the Chicago Mercantile Exchange, even though three weeks later plaintiff obtained another membership.

3. A group boycott was found where group action resulted in a used car dealer being deprived of access to only one particular type of car, "factory Fords".

& Produce Bldg., 194 F.2d 484 (1st Cir. 1962), *cert. den.*, 344 U.S. 817 (1952).[4]

In summary, Respondent's Opposing Brief is not based upon the holding of the Court of Appeals, but upon a legal premise which goes well beyond that Court's holding; a premise which Respondent neither attempts to support, nor which can be supported, by citation of cases.

2. Respondent's Brief in Opposition to the Petition for Certiorari is Based upon a Statement of Facts Contrary to the Evidence from Ford's Own Witnesses and Documents.

The argument in Respondent's Opposing Brief is also based upon a statement of facts contrary to the record. We shall not attempt to point out every instance of incorrect references to the record in the Opposing Brief, but only those which go to the nature of the conduct comprising the group boycott, since they are crucial to the legal issue in the case. In so doing we shall not refer to evidence in plaintiffs' case, but only to testimony of Ford witnesses and documents from Ford's files.

At page 3 of Respondent's Opposing Brief, it is stated that the other dealers "protested" to Ford about the "special features" of Ford's deal with plaintiffs for Presidential. It is clear from Ford documents, however, that the dealers went beyond mere protests and made threats to Ford if it went through with the deal with plaintiffs. Thus, in D-64, minutes of Ford's Dealer Policy Board, it is stated

4. As the result of group action plaintiff, a produce dealer, was excluded from a produce market. The First Circuit held that a cause of action had been made out despite the fact that alternate facilities were available nearby. Although the case was brought as a monopoly case, the Court held (194 F.2d at pp. 488-89) that it might also have been brought as a conspiracy (group boycott) case, and the cases cited by the Court to support its holding were group boycott cases.

that Pacifico, a leader of the "protest", ". . . said he will ask the Company to buy him out if the proposed deal involving Presidential Ford has been or is consummated." (276ex). Indeed, Ford, at page 16 of its Pretrial Memorandum, stated that a "threat" by the dealers was one of the "main grounds" of Ford's decision not to consummate the Presidential deal with plaintiffs.

At page 3 of the Opposing Brief, it is stated that one of the special features of the Presidential deal between Ford and plaintiffs was that plaintiffs could manage Presidential for 90 days after which plaintiffs "might" put their money into the venture, and that the other dealers protested because they feared plaintiffs would use Ford's money to operate Presidential, thereby giving plaintiffs an unfair competitive advantage over them. Ford's deal with plaintiffs, however, was not that after 90 days plaintiffs "might" put their money into Presidential, but that they "would" do so. This is evidenced by P-75, a "Dealer Contact Report" prepared by Dennis Wiggins, Ford's Regional Manager. That report reveals that Wiggins, together with Ford's District Manager and two Assistant District Managers, met with Pacifico to hear the dealers' objections to Ford's deal with plaintiffs for Presidential. One of the objections expressed by Pacifico was that plaintiffs were being permitted a 90 day "trial period". (118ex). Wiggins, however, advised Pacifico that this was a "misunderstanding" on Pacifico's part and that after the specified period plaintiffs "*would* invest their money". (119ex). (Emphasis added).

Furthermore, a complaint that plaintiffs would gain an unfair competitive advantage over the other dealers by operating Presidential with Ford's money for 90 days makes no sense under the record in this case. Presidential had been operated as a "company store", with Ford's money, for years before plaintiffs got into the picture; and D-42, a letter from Matthews, one of the protesting dealers, to Naughton, Vice-President of Ford, confirming

the "agreement" between Ford and the dealers, stated that one of its terms was that "The present deal with . . . (plaintiffs) is a dead issue and that Ford will continue to operate this facility as a Company Store until arrangements can be made to sell the location to a qualified buyer." (267ex). Thus, it is clear that the other dealers were much more concerned about Presidential being operated by plaintiffs than they were with Presidential being operated indefinitely as a company store with Ford's money.

Furthermore, two of the other dealers, Pacifico and Matthews, testified as Ford witnesses that without "concessions" of the sort contained in Ford's deal with plaintiffs, Presidential could not be operated profitably, but that nevertheless they objected to Ford granting plaintiffs such concessior . They reluctantly conceded that the logical deduction to be drawn from their testimony was that what they really wanted was that Presidential be shut down (418a-419a, 595a); and they admitted in their testimony that they had frequently suggested to Ford that Presidential be shut down. (409a, 600a-601a). Additionally, Jack Mendel, Ford's District Manager, testified that Valentino, one of the dealers objecting to the "special concessions" to plaintiffs, had offered to pay Ford one half the rent for Presidential that plaintiffs had agreed to pay; and that Pacifico, the principal objector, had offered to buy Presidential from Ford for "10 cents on a dollar", but that Ford had rejected these offers. (550a, 552a-553a).

From this evidence from Ford's own witnesses and documents, it is clear that the other dealers were not really concerned with the so called "special concessions" to plaintiffs; and that their real concern was that if they could not acquire Presidential themselves at a bargain price, they wanted to prevent plaintiffs from acquiring Presidential upon terms whereby plaintiffs might be successful, so that ultimately Ford would be forced to close down Presidential, thereby eliminating a competitor.

At page 4 of the Opposing Brief, it is stated that the other dealers "*never* objected" (emphasis by Ford) to plain-

tiffs becoming Ford dealers "at Presidential *or any other dealership*". (Emphasis added). Again, this is contrary to the evidence from Ford documents and Ford witnesses. Thus, Pacifico testified that he objected to Ford permitting Chestnut, the dealership which plaintiffs had operated successfully before it was damaged by fire, to be repaired and reopened, as plaintiffs wished to do. (596a-597a); and this is confirmed by a memorandum of Ford's Dealer Policy Board. (D-64, 286ex). The reason for Pacifico's concern that Chestnut not be reopened by plaintiffs is clearly explained by D-116 (358ex-367ex), a market study prepared by Ford, which reveals that Pacifico's dealership was located near Chestnut, and that during the period plaintiffs operated Chestnut, Chestnut's sales increased dramatically, whereas Pacifico's sales dropped sharply.

At page 4 of the Opposing Brief, it is stated that Ford's legal department advised Ford that offering a deferred rent plan to plaintiffs would create a Robinson-Patman Act problem unless it was also offered to other dealers, and that ". . . Ford then *discussed* with other dealers the *possibility* of offering them deferred rent plans. . . .". (Emphasis added). Ford documents and witnesses, however, disclose that Ford did not merely discuss the possibility of offering a deferred rent plan to other dealers, but that Ford actually offered the plan to the other dealers. Thus, P-75, the "Dealer Contact Report" prepared by Wiggins, Ford's Regional Manager, states that at a meeting Wiggins held with Pacifico "We further stated we would accord any other dealer in the market the same deferred rent program. . . ." (119ex); and in his testimony Wiggins admitted that Pacifico was the acknowledged leader of the other dealers and that by making the offer through Pacifico he knew it would reach the other dealers (618a-619a). Thus, any possible Robinson-Patman Act problem which the deferred rent plan might have created was obviated when Ford took the advice of its legal department and offered a deferred rent plan to the other dealers.

At page 4 of the Opposing Brief, reference is made to the "objectionable special terms" of Ford's deal with plaintiffs for Presidential, and at page 5 it is stated that on January 9, 1970 Naughton, Vice-President of Ford ". . . travelled to Philadelphia and announced his decision to the dealers" not to go through with the deal. The inference is that there were features in Ford's deal with plaintiffs which were "objectionable" *to Ford*, and that Naughton merely came to Philadelphia to "announce" his unilateral decision to the other dealers. Again, Ford documents and witnesses are to the contrary.

Thus, Geoffrey Curran, national head of Ford's Dealer Development program, testified that the proposed sale of Presidential to plaintiffs "would certainly be beneficial to us", and that "we would like very much to have sold it" to plaintiffs (388a); and D-64, a memorandum of Ford's Dealer Policy Board, discloses that William Heller, Ford's National Sales Manager, considered the terms of Ford's deal with plaintiffs to be reasonable (280ex-281ex). Indeed, Wiggins, Ford's Regional Manager, met with Pacifico on January 7, 1970 and attempted to convince him that the terms of Ford's deal with plaintiffs were fair and not special concessions to plaintiffs, and that the dealers should withdraw their objections. (See Wiggins testimony 614a-615a and the Dealer Contact Report he prepared, P-75, 117ex-120ex).

Furthermore, Ford documents and witnesses reveal that Naughton, on January 9, 1970 did not just "announce" to the other dealers a decision not to proceed with the Presidential deal with plaintiffs. To the contrary, P-76, a memorandum of that meeting prepared by Ford's District Manager, Mendel, discloses that Naughton told the dealers that "inasmuch as *they* were opposed to the proposition" (emphasis added) Ford would not go through with it, because Naughton "had no intention of disturbing eleven dealers for the sake of one dealership." (122ex). Phillip Rulli, Ford's Assistant District Manager, who was

present at that meeting, testified that before Naughton announced his decision to the dealers there was "heated discussion" by the dealers who "were pretty hot about it". (534a). It should also be noted that Naughton's meeting with the other dealers was on January 9, 1970, just two days after Ford's Regional Manager, District Manager, and two Assistant District Managers had met with Pacifico to try to convince him that Ford's deal with plaintiffs was a fair one and that the other dealers should withdraw their objections.

At page 11 of the Opposing Brief, it is stated that ". . . coercion was not even suggested as an issue" in this case. We would respectfully suggest that from the foregoing, and a great deal more contained in the record, it is clear that coercion was not only suggested, but was proved by Ford's own documents and witnesses.

Respectfully submitted,

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